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No. 2647

United States
Circuit Court of Appeals

For the Ninth Circuit.

Apostles on Appeal.
(IN TWO VOLUMES)

ALASKA COAST COMPANY, a Corporation,
Claimant of the Steamship "JEANNIE,"
Her Tackle, Apparel, Furniture, etc.,
Appellant,
vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Appellee.

VOLUME I.
(Pages 1 to 288, Inclusive.)

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division.

Filed

OCT 6 - 1915

E. D. Monckton,

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Circuit Court of Appeals

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Western District of Washington, Northern Division.

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*In the United States District Court for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANNIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent.

ALASKA COAST COMPANY, a Corporation,
Claimant.

Names and Addresses of Counsel.

W. H. BOGLE, Esq., 609-616 Central Building,
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Proctors for Claimant and Appellant.

J. A. KERR, Esq., 1309-16 Hoge Building, Seattle,
Washington,

E. S. McCORD, Esq., 1309-16 Hoge Building,
Seattle, Washington,

C. H. HANFORD, Esq., Colman Building, Seattle,
Washington,

Proctors for Libelant and Appellee. [1*]

*Page-number appearing at foot of page of certified Apostles on Ap-
peal.

*In the United States District Court for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANNIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

STATEMENT.

TIME OF COMMENCEMENT OF SUIT.

September 29, 1913.

NAMES OF PARTIES.

Alaska Pacific Fisheries, a corporation, libelant.

Alaska Coast Company, a corporation, claimant.

DATES WHEN PLEADINGS WERE FILED.

Libel: September 29, 1913.

Answer: October 13, 1913.

Amended Libel: March 21, 1914.

Amended Answer: March 25, 1914.

Second Amended Libel: February 17, 1915.

Stipulation as to Amended Answer: March 30,
1915. [2]

ISSUANCE OF PROCESS AND SERVICE THEREOF.

The libel herein was filed in the above-entitled court on September 29, 1913. Process was issued on

that day and delivered to the United States Marshal, for the seizure of the said steamship "Jeanie." Without waiting for, but waiving formal seizure of the vessel, the Alaska Coast Company, owner thereof, on September 29, 1913, duly entered its appearance in said cause, filed its claim for said vessel, and a duly approved stipulation in the sum of \$15,000.00, for the release of said vessel, with United States Fidelity & Guaranty Company, a corporation, as surety. No other property was attached or arrested, nor defendant arrested, nor bail taken in said cause.

REFERENCE TO COMMISSIONER.

On January 27, 1914, the said Court duly made and filed an order of reference in said cause to A. C. Bowman, United States Commissioner, to take and report the testimony in said cause, and on March 22, 1915, said Commissioner duly returned the testimony taken before him in said cause into court, and the same was on said day filed in the office of the clerk thereof. Theretofore there had been taken in said cause, pursuant to stipulations therein between the said parties, certain depositions, which had also been duly returned, published and filed in said court. Certain facts in said cause had also theretofore been stipulated therein. No question of fact was referred to a Commissioner. [3]

TRIAL.

On May 24, 1915, said cause came duly on for trial and final hearing before Honorable Jeremiah Neterer, one of the Judges of said court, upon said pleadings, stipulations, the testimony so taken before said Commissioner, and returned and filed in court,

together with Libellant's Exhibits "A" and "B," and Respondent's Exhibits 1, 2, 3, 4, 6 and 7, which were offered in evidence by said respective parties, and returned by said Commissioner and filed in said court (no exhibit 5 having been returned or filed), also the depositions theretofore taken and filed in said cause. Proctors for the respective parties appeared and argued said cause in open court, and thereafter submitted written briefs to said Court. Thereafter, and on June 25, 1915, said Judge, before whom said cause was tried and heard, duly filed his memorandum decision on the merits in said cause.

FINAL DECREE.

Final decree, in accordance with such memorandum decision on the merits, was filed July 12, 1915, which decree was signed by Honorable Jeremiah Neterer, the Judge who heard and tried said cause.

NOTICE OF APPEAL.

Notice of Appeal, with admission of service thereof, filed July 30, 1915. [4]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libellant,

vs.

Steamship "JEANIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

Libel.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

The libel and complaint of Alaska Pacific Fisheries, a corporation of Portland, Oregon, against the steamship "Jeanie," her tackle, apparel and furniture, and against all persons claiming any interest therein, in a cause of tort and damage to cargo, civil and maritime:

I.

That at all times herein mentioned the libelant was and now is a corporation duly organized and existing under the laws of the State of Oregon, with its principal place of business in the City of Portland, and as such corporation was at all times herein mentioned and now is the owner of certain salmon canneries located at Chilcoot, Chomley and Yes Bay in the Territory of Alaska.

II.

That in the months of December, 1912, and January, 1913, the steamship "Jeanie" was a common carrier of passengers and freight between ports in Alaska and Puget Sound in the State of Washington. [5]

III.

That on the 21st day of December, 1912, at Chilcoot, in Alaska, the libelant delivered to said steamship "Jeanie" for transportation to Seattle, 10,747 cases of canned salmon; and on the 27th day of December, 1912, at Yes Bay, Alaska, the libelant delivered to said steamship "Jeanie" for transportation

to Seattle, 13,972 other cases of canned salmon; and on the 2d day of January, 1913, at Chomley, Alaska, the libelant delivered to said steamship "Jeanie," for transportation to Seattle, 4,737 other cases of canned salmon, making the entire consignment of canned salmon to be carried to Seattle on the then intended voyage of said steamship, 29,657 cases, all containing canned salmon and in good order and well conditioned, and the same were received by the master of said steamship and taken on board the said vessel.

IV.

That having received said merchandise for transportation to Seattle, it became and was the duty of said vessel, her master and crew, to carry the same safely and discharge and deliver the same at Seattle in good order and well conditioned as at the time of shipment.

V.

That the total value of said 29,657 cases of canned salmon, at the time when the same should have been delivered at the termination of said voyage was Ninety Thousand Dollars.

VI.

That on the 2d day of January, 1913, said steamship "Jeanie" having all of said merchandise on board, proceeded on her voyage to Seattle, where she arrived on the 8th day of January, 1913, and there discharged her cargo, including all of said [6] merchandise, at Virginia St. dock, for delivery to the libelant and thereupon the libelant paid the freight stipulated to be paid for the transportation of said merchandise.

VII.

That by the misconduct and negligence of the master of said steamship "Jeanie" and her crew, a large part of said merchandise, to wit, 4,000 cases was improperly stowed in the lower hold of said ship, without being properly dunnaged to protect the same from injury by displacement, and by contact with bilge water and damage by water leaking through the interior skin of the ship. And by the negligence and misconduct of the captain and crew of the said ship, the whole interior of the space in said ship used for the stowage of the cargo was in an unclean and unfit condition for the carriage of merchandise, in this: That previous to receiving the cargo for transportation on said voyage, a cargo of coal in bulk had been carried in said ship and delivered at ports in Alaska, and large quantities of coal and coal-dust remained in the interior of the ship and the whole of her interior space was unclean. That by reason of the unseaworthiness of said ship, she took in an unusual quantity of water on her voyage to Seattle, by a leakage through seams on the deck and elsewhere in said ship, which the libelant is unable to specify. That by reason of the misconduct and negligence of the master and crew of said ship the pumps were not operated sufficiently to keep the vessel free from an accumulation of water in her hold, and the same coming in through the skin of the ship and in contact with the cargo and being mixed with coal-dust, injured and damaged all of said 29,657 cases of sal-

mon in this: That all of said cases were stained and blackened and rendered worthless and the tin cans containing the salmon were made wet and rusty, the labels thereon [7] being for the most part stained, wet and discolored and considerable quantities of coal-dust penetrated the cases, causing injury to the cans to such an extent that it became and was necessary to recondition all of said cans by removing the same from the damaged cases and repacking them and a large number of the cans required relacquering and relabeling in order to restore the same to marketable condition.

VIII.

That promptly as practicable a special examination and survey of the cargo was made and notice of damage was given to the owner of said steamship "Jeanie."

IX.

That with the knowledge and approval of the owner, and in order to reduce the amount of loss by reason of said damage to a minimum, the libelant causes said merchandise to be overhauled and reconditioned and thereby incurred an expense of Forty-two Hundred and Eighty-two and Six-hundredths Dollars (\$4282.06), which amount was the reasonable cost of labor and material necessary and which amount the libelant has paid.

X.

That by reason of said damage the said merchandise, after being so overhauled and reconditioned, was depreciated in value to the amount of Twenty-five Hundred Dollars.

XI.

That by reason of the damage to said merchandise and the necessity for overhauling and reconditioning the same, the libelant was delayed in marketing and disposing of said merchandise and deprived of the income that should have been received from the sale thereof, for a period of three (3) months, and thereby sustained an additional loss in the sum of One Thousand Dollars. [8]

XII.

That by reason of the irremediable damage thereto by reason of rust on the cans, 2,000 in number of cases are in an unsalable condition and libelant has been unable to sell or dispose of the same, whereby libelant has sustained loss in the sum of Forty-five Hundred Dollars.

XIII.

That all of said damages were caused by the unseaworthiness of said vessel and by the bad stowage and by the want of proper dunnage thereof on board said vessel, and by the negligence, carelessness, improper conduct and want of attention of the master, his mariners and servants, in loading said salmon in the hold of said vessel without having removed therefrom large quantities of coal and coal-dust and in failing and neglecting to keep the decks of said vessel properly caulked, the hatches properly battened down during said voyage and in failing to keep the same covered with safe, adequate and secure tarpaulin and in failing to maintain adequate pumps on said vessel and to operate the same and keep the water out of the bilges of said vessel and out of the

hold of said vessel where said salmon was stowed and in permitting the bilge water negligently allowed to collect and remain in said vessel from entering the hold where said salmon were stowed, whereby said salmon were permeated with coal-dust and water and damaged as above alleged, and by not having delivered the same in good order and condition and free from damage. That said damage occurred to said cargo while said ship was on the voyage aforesaid.

XIV.

That the master and owners of said vessel and their agents have neglected and failed to render any compensation to libelant for the damage sustained as aforesaid. [9]

XV.

That said steamer "Jeanie" is an American vessel and is now within the district and within the jurisdiction of this court.

XVI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, the libelant prays that process in due form of law and according to the course and practice of this Court in causes of admiralty and maritime jurisdiction may issue against the said steamer "Jeanie," her engines, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that said steamer "Jeanie," her engines, tackle, apparel and furniture, etc., may be condemned and sold to satisfy the claims of the libel-

ant aforesaid, with interest thereon from the date of filing this libel, and for costs.

C. H. HANFORD,
KERR & McCORD,

Proctors and Attorneys for Libelant. [10]

State of Oregon,
County of Multnomah,—ss.

John H. Burgard, being first duly sworn, on oath deposes and says: I am vice-president of the libelant, Alaska Pacific Fisheries; I have read the above and foregoing libel and know the contents thereof and the same is true as I verily believe.

JOHN H. BURGARD.

Subscribed and sworn to before me this 16th day of September, A. D. 1913.

[Seal]

G. A. HARTMAN,

Notary in and for the State of Oregon.

[Indorsed]: Libel. Filed in the U. S. District Court, Western District of Washington, Sept. 29, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [11]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

IN ADMIRALTY.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

Steamship "JEANIE," Her Tackle, Apparel, Furn-
iture, etc.,

Respondent,

ALASKA COAST COMPANY,

Claimant.

Answer.

To the Honorable JEREMIAH NETERER, Judge of
the Above-entitled Court:

The answer of the Alaska Coast Company, a corporation, the above-named claimant, and sole owner of the steamship "Jeanie," her tackle, apparel, furniture, etc., to the libel of the Alaska Pacific Fisheries, in a cause of tort and damage to cargo, civil and maritime.

I.

For answer to the first article of the libel, claimant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained herein, but claimant here states that so far as it is advised, the facts stated in said first article are true.

II.

Answering the second article of the libel, claimant admits that during the month of December, 1912, and January, 1913, the steamship "Jeanie" was a common carrier of freight between ports in Puget Sound, in the State of Washington, and ports in Alaska, and that during said time said steamship was engaged in [12] voyages between the said ports, said voyages commencing and ending at the port of Seattle, said port being the home port of said steamer.

III.

For answer to the third article of the libel, this claimant admits that on or about the 21st day of December, 1912, at Chilcoot, Alaska, libelant delivered to the steamer "Jeanie" approximately 10,747 cases of canned salmon; that on the 30th day of December, 1912, at Yes Bay, Alaska, libelant delivered to the steamer "Jeanie" approximately 13,972 cases of canned salmon; and that on the 2d day of January, 1913, at Chomley, Alaska, libelant delivered to said steamer "Jeanie" approximately 4737 cases of canned salmon. Claimant admits that all of said salmon which was delivered to the steamer "Jeanie" was delivered for transportation to Seattle, and that the same was taken aboard said vessel. Except as herein expressly admitted, claimant denies each and every allegation in said article three contained.

IV.

For answer to article four of the libel, this claimant denies each and every allegation therein contained.

V.

For answer to article five of the libel, this claimant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and asks that if the same be material, the libelant be required to prove the same.

VI.

For answer to article six of the libel, this claimant admits that the said steamer "Jeanie," having all of said merchandise on board which had been delivered to it by libelant, sailed from Chomley, Alaska, on or about the 2d day of January, 1913, [13] on her return voyage to Seattle, and that she arrived at Seattle on or about the 8th day of January, 1913, and discharged her cargo, including the merchandise belonging to libelant, at the Virginia Street dock in said city. Except as herein expressly admitted, claimant denies the allegations of said article six.

VII.

For answer to article seven of the libel, claimant denies each and every allegation in said article contained.

VIII.

Answering article eight of the libel, claimant denies each and every allegation therein contained.

IX.

For answer to article nine of said libel, claimant admits that the said libelant caused the said merchandise to be overhauled and reconditioned, and thereby incurred an expense of \$4,282.06. Except as herein expressly admitted, claimant denies each and

every allegation of said article nine.

X.

For answer to article ten of the libel, claimant denies each and every allegation therein contained.

XI.

For answer to article eleven of the libel, claimant denies each and every allegation therein contained.

XII.

For answer to article twelve, claimant denies each and every allegation therein contained.

XIII.

For answer to article thirteen of the libel, claimant denies each and every allegation therein contained.

XIV.

For answer to article fourteen of the libel, claimant admits that neither the master or owner of said vessel, or their [14] agents, have paid libellant any sum on account of damage to said merchandise. Except as herein expressly admitted, claimant denies the allegations of article fourteen.

XV.

For answer to article fifteen of the libel, claimant admits the allegations therein contained.

XVI.

For answer to article XVI of the libel, claimant denies that the premises are true, except as hereinbefore in this answer expressly admitted, and admits that this cause is within the admiralty and maritime jurisdiction of this court.

And this claimant, further answering said libel, says:

I.

That prior to the commencement of the voyage mentioned in the said libel, and at the time of the commencement of said voyage, the then owner of the said steamship "Jeanie" exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied and claimant alleges that at all the times mentioned in said libel the said steamship "Jeanie" was seaworthy, properly manned, equipped and supplied, and that the damage to said merchandise, if any such damage occurred in said merchandise while it was aboard said vessel, was caused by extremely rough weather encountered on the said voyage, by perils of the sea, and by faults or errors in navigation or in the management of the said vessel on the said voyage.

WHEREFORE, this claimant having fully and completely answered the allegations of the said libel herein, respectfully prays that this cause be dismissed, and that it have and recover [15] its costs and disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant.

United States of America,

State of Washington, County of King,—ss.

Lawrence Bogle, being first duly sworn, on oath deposes and says: That he is one of the proctors for Alaska Coast Company, claimant above named, that he has read the foregoing answer, knows the contents thereof, and believes the same to be true, and that he is authorized to, and makes this verification for and

on behalf of the said claimant.

LAWRENCE BOGLE,

Subscribed and sworn to before me this 16th day of October, 1913.

[Seal]

F. T. MERRITT,

Notary Public in and for the State of Washington,
Residing at Seattle.

Service of within Answer this 16th day of October, 1913, and receipt of a copy thereof, admitted.

KERR & McCORD,

Attorneys for Libellant.

TO WHOM IT MAY CONCERN:

Notice is hereby given that service of all subsequent papers in the within-named action, except writs and process, may be made upon respondent claimant, by serving same upon Bogle, Graves, Merritt & Bogle, as proctors for respondent claimant at 609-616 Central Building, Seattle, Wash.

BOGLE, GRAVES, MERRITT & BOGLE,

For Respondent Claimant.

[Indorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 16, 1913. Frank L. Crosby, Clerk. By B. O. W., Deputy. [16]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

ALASKA FISHERIES, a Corporation,

Libelant,

vs.

Steamship "JEANIE," her Tackle, Apparel, Furn-
iture, etc.,

Respondent,

Amended Libel.

To the Honorable JEREMIAH NETERER, Judge of
the Above-entitled Court:

The amended libel and complaint of Alaska Fish-
eries Company, a corporation of Portland, Oregon,
against the steamship "Jeanie," her tackle, apparel
and furniture, and against all persons claiming any
interest therein, in a cause of tort and damage to
cargo, civil and maritime, filed by leave of court, al-
leges as follows:

I.

That at all times herein mentioned the libelant was
and now is a corporation duly organized and existing
under the laws of the State of Oregon, with its prin-
cipal place of business in the City of Portland, and as
such corporation was at all times herein mentioned
and now is the owner of certain salmon canneries
located at Chilcoot, Chomley and Yes Bay, in the
Territory of Alaska.

II.

That in the months of December, 1912, and January [17] 1913, the steamship "Jeanie" was a common carrier of passengers and freight between ports in Alaska and Puget Sound in the State of Washington.

III.

That on the 21st day of December 1912, at Chilcoot, in Alaska, the libelant delivered to said steamship "Jeanie," for transportation to Seattle, 10,747 cases of canned salmon; and on the 27th day of December, 1912, at Yes Bay, Alaska, the libelant delivered to said steamship "Jeanie" for transportation to Seattle, 13,972 other cases of canned salmon; and on the 2d day of January, 1913, at Chomley, Alaska, the libelant delivered to said steamship "Jeanie," for transportation to Seattle, 4737 other cases of canned salmon to be carried to Seattle on the then intended voyage, making the entire consignment of canned salmon to be carried to Seattle on said voyage of said steamship, 29,657 cases, all containing canned salmon and in good order and well conditioned, and the same were received by the master of said steamship and taken on board the said vessel.

IV.

That having received said merchandise for transportation to Seattle, it became and was the duty of said vessel, her master, and crew, to carry the same safely and discharge and deliver the same at Seattle in good order and well conditioned as at the time of shipment.

V.

That the total value of said 29,657 cases of canned salmon, at the time when the same should have been delivered at the termination of said voyage if the same had been in the same good condition then as when received on board of said steamship "Jeanie," would have been Eighty-five Thousand Six Hundred and Thirty and 40/100 (\$85,630.40) Dollars. [18]

VI.

That on the 2d day of January, A. D. 1913, said steamship "Jeanie" having all of said merchandise on board, proceeded on her voyage to Seattle, where she arrived on the 8th day of January, 1913, and there discharged her cargo including all of said merchandise at Virginia Street dock, for delivery to the libelant, and thereupon the libelant paid the freight stipulated to be paid for the transportation of said merchandise.

VII.

That by the misconduct and negligence of the master of said steamship "Jeanie" and her crew, a large part of said merchandise, was improperly stored in the lower hold of said ship without being properly dunnaged to protect the same from injury by displacement, and by contact with bilge water and damaged by water leaking through the interior skin of the ship; and by the negligence and misconduct of the captain and crew of the said ship, the whole interior of the space in said ship used for the storage of the cargo was in an unclean and unfit condition for the carriage of merchandise, in this: That previous to receiving the cargo for transportation on

said voyage, a cargo of coal in bulk had been carried in said ship and delivered at ports in Alaska and large quantities of coal and coal-dust remained in the interior of the ship and the whole of her interior space was unclean; that by reason of the unseaworthiness of said ship, she took in an unusual quantity of water on her voyage to Seattle, by a leakage through seams on the deck and elsewhere in said ship, which the libelant is unable to specify. That by reason of the misconduct and negligence of the master and crew of said ship the pumps were not operated sufficiently to keep the vessel [19] free from an accumulation of water in her hold, and the same coming in through the skin of the ship and in contact with the cargo, and being mixed with coal-dust, injured and damaged all of said 29,657 cases of salmon in this: That a large number of said cases were stained and blackened and rendered worthless and the tin cans containing the salmon were made wet and rusty, the labels thereon being for the most part stained, wet and discolored and considerable quantities of coal-dust penetrated the cases, to such an extent that the cans therein and the labels thereon were soiled and made unmarketable without cleaning; and the coal-dust within said cases was not discoverable without opening the same for inspection and for that reason it was necessary to open and repack each and every of said 29,657 cases and recondition several thousand cans by wiping, scouring, relacquering and relabeling in order to restore the same to marketable condition.

VIII.

That promptly as practicable a special examination and survey of the cargo was made and notice of damage was given to the owner of said steamship "Jeanie."

IX.

That with the knowledge and approval of the owner and in order to reduce the amount of loss by reason of said damage to a minimum, the libelant caused said merchandise to be overhauled and reconditioned and thereby incurred an expense of Forty-two Hundred and Eighty-two and Six-hundredths Dollars (\$4282.06), which amount was the reasonable cost of labor and material necessary and which amount the libelant has paid.

X.

That during said period of delay and detention of said merchandise for necessary reconditioning of the same, the [20] market price thereof declined, so that the difference in the market value thereof was the sum of Seventy-nine Hundred Thirty-five and Forty-hundredths Dollars (\$7935.40) less at the time the work was completed, than the value thereof on January 10th, 1913, the date on which said merchandise was discharged from said steamship "Jeanie," and the libelant sustained a loss by reason of such diminished value, to the amount of \$7,935.40.

XI.

That by reason of the damage to said merchandise and the necessity for overhauling and reconditioning the same the libelant was delayed in marketing and disposing of said merchandise and deprived of the

income that should have been received from the sale thereof, for a period of Seventy days (70) and thereby sustained an additional loss in the sum of Nine Hundred and Eighty-five and 60/100 Dollars (\$985.60.)

XII.

That by reason of said delay while said merchandise was being reconditioned to make it fit for market, the libelant incurred expenses for seventy (70) days storage amounting to Seven Hundred Seventy-eight and Forty-seven Hundredths Dollars (\$778.47), and for insurance for the same period of One Hundred and Fifty and Fifty-four Hundredths Dollars (\$150.54).

XIII.

That all of said damage was caused during said voyage by the unseaworthiness of said vessel and by the bad stowage and by the want of proper dunnage therefor on board said vessel and by the negligence, carelessness, improper conduct and want of attention of the master, his mariners and servants in loading said salmon in the hold of said vessel without removing therefrom large quantities of coal and coal-dust and in failing and [21] neglecting to keep the decks of said vessel properly caulked and the hatches properly battened down during said voyage and in failing to keep the same covered with safe, adequate and secure tarpaulin and in failing to maintain adequate pumps on said vessel and to operate the same and keep the water out of the bilges of said vessel and out of the hold of said vessel where said salmon was stowed, whereby said salmon were

permeated with coal-dust and water and damaged as above alleged, and by not having delivered the same in good order and condition and free from damage.

XIV.

That the master and owners of said vessel and their agents have neglected and failed to render any compensation to libelant for the damage sustained as aforesaid.

XV.

That the said steamship "Jeanie" at the times hereinbefore referred to and at the time of the commencement of this suit was an American vessel, and at the time of commencing this suit and the filing of the claimant's stipulation to satisfy the degree to be rendered herein, said vessel was within the jurisdiction of this court.

XVI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, the libelant prays that process in due form of law and according to the course and practice of this court in causes of admiralty and maritime jurisdiction may issue against the said steamer "Jeanie," her engines, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer the matters [22] aforesaid, and that said steamer "Jeanie," her engines, tackle, apparel and furniture," etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with interest thereon

from the date of filing the libel, and for costs.

C. H. HANFORD,
KERR & McCORD,
Proctors for Libelant.

State of Washington,
County of King,—ss.

C. A. Burckhardt, being first duly sworn, on oath deposes and says: I am president of the libelant, Alaska Fisheries Company; I have read the above and foregoing libel and know the contents thereof and the same is true as I verily believe.

C. A. BURCKHARDT.

Subscribed and sworn to before me this 6th day of Mch., A. D. 1914.

[Seal] J. N. HAMILL,
Notary Public in and for the State of Oregon, Residing at Portland.

[Indorsed]: Amended Libel. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 21, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [23]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

Steamship "JEANIE," Her Tackle, Apparel, Fur-
niture, etc.,

Respondent.

ALASKA COAST COMPANY,

Claimant.

Amended Answer.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

The amended answer of the Alaska Coast Com-
pany, a corporation, the above-named claimant and
sole owner of the S. S. "Jeanie," her tackle, apparel,
furniture, etc., to the libel of the Alaska Pacific Fish-
eries in a cause of tort and damage to cargo, civil and
maritime.

I.

Claimant admits the allegations of the first article
of the libel.

II.

Answering the second article of the libel, claimant
admits that during the months of December, 1912,
and January, 1913, the steamship "Jeanie" was a
common carrier of freight between ports in Puget
Sound, in the State of Washington, and ports in

Alaska, and that during said time the said steamship was engaged in voyages between the said ports, said voyages commencing and ending at the ports of Seattle, said port being the home port of said steamship. [24]

III.

For answer to the third article of the libel, this claimant admits that on or about the 21st day of December, 1912, at Chilcoot, Alaska, libelant delivered to the steamer "Jeanie" approximately 10,747 cases of canned salmon; that on the 30th day of December, 1912, at Yes Bay, Alaska, libelant delivered to the steamer "Jeanie" approximately 13,972 cases of canned salmon; and that on the 2d day of January, 1913, at Chomley, Alaska, libelant delivered to said steamer "Jeanie" approximately 4737 cases of canned salmon. Claimant admits that all of said salmon which was delivered to the steamer "Jeanie" was delivered for transportation to Seattle, and that the same was taken aboard said vessel. Except as herein expressly admitted, claimant denies each and every allegation in said article there contained.

IV.

For answer to article four of the libel, this claimant denies each and every allegation therein contained.

V.

For answer to article five of the libel, this claimant states that it is without knowledge or information sufficient to form a belief as to the truth of the

allegations therein contained, and asks that if the same be material, the libelant be required to prove the same.

VI.

For answer to article six of the libel, this claimant admits that the said steamer "Jeanie," having all of said merchandise on board which had been delivered to it by libelant, sailed from Chomley, Alaska, on or about the 2d day of January, 1913, on her return voyage to Seattle, and that she arrived at Seattle on or about the 8th day of January, 1913, and discharged her cargo, including the merchandise belonging to libelant, at the Virginia [25] Street block in said city. Except as herein expressly admitted, claimant denies the allegations of said article six.

VII.

For answer to article seven of the libel, claimant denies each and every allegation in said article contained.

VIII.

Answering article eight of the libel, claimant denies each and every allegation therein contained.

IX.

For answer to article nine of said libel, claimant admits that the said libelant caused the said merchandise to be overhauled and reconditioned, and thereby incurred an expense of \$4,282.06. Except as herein expressly admitted, claimant denies each and every allegation of said article nine.

X.

Answering article ten of the libel, claimant denies each and every allegation therein contained.

XI.

For answer to article eleven of the libel, claimant denies each and every allegation therein contained.

XII.

For answer to article twelve, claimant denies each and every allegation therein contained.

XIII.

For answer to article thirteen of the libel, claimant denies each and every allegation therein contained.

XIV.

For answer to article fourteen of the libel, claimant admits that neither the master or owner of said vessel, or their agents, have paid libellant any sum on account of damages to said merchandise. Except as herein expressly admitted, claimant denies the allegations of article fourteen. [26]

XV.

For answer to article fifteen of the libel, claimant admits the allegations therein contained.

XVI.

For answer to article XVI of the libel, claimant denies that the premises are true, except as hereinbefore in this answer expressly admitted, and admits that this cause is within the admiralty and maritime jurisdiction of this court. [27]

And this claimant, further answering said libel, says:

I.

That at all the times alleged in the libel herein it was the sole owner of the S. S. "Jeanie," but that at all said times, said steamer was under time charter

to the W. F. Swan & Company, and was at all said times being operated by the said W. F. Swan & Company, as a common carrier of freight for hire to and from the port of Seattle and various ports in the District of Alaska, and between such various ports in the District of Alaska.

II.

That on or about the 19th day of December, 1912, the said libelant Alaska Pacific Fisheries delivered to the said steamer, at its Chilcoot cannery on Chilcoot Inlet 10,638 cases of canned salmon for carriage and delivery to Kelley Clarke Company, Seattle; that upon the delivery of this shipment of salmon to the said steamship "Jeanie," the purser of said steamship "Jeanie," as agent of W. F. Swan & Company, charterers and operators of said steamer, issued and delivered to said libelant a bill of lading or shipping receipt covering the carriage of said salmon, a copy of which said bill of lading or shipping receipt is attached hereto, marked exhibit "A" and made a part hereof.

III.

That after the issuing of said bill of lading or shipping receipt, covering the carriage of said salmon, and after delivering the same to the libelant, and the acceptance thereof by said libelant, and after finishing loading said goods, the said steamship "Jeanie" proceeded on her said voyage, and after encountering extremely rough and tempestuous weather, during which the steamer labored and strained heavily and shipped large quantities of water on deck, the said steamer on the 30th day of December, 1912, ar-

rived at libelant's Yes Bay cannery a short distance from Ketchikan, Alaska. [28]

IV.

That on or about the 31st day of December, 1912, libelant delivered to the said steamship "Jeanie," at its said Yes Bay cannery, approximately 14,027 cases of canned salmon, for carriage and delivery to Kelley Clarke Company, Seattle; that upon the delivery of said salmon to said steamship "Jeanie," the purser of said steamship, as agent of the charterers and operators of said steamship, issued and delivered to the libelant a bill of lading or shipping receipt, covering the carriage of said shipment of salmon, a copy of which bill of lading or shipping receipt is attached hereto marked exhibit "B" and made a part hereof.

V.

That after issuing said bill of lading or shipping receipt, and delivering the same to the said libelant, and the acceptance thereof by the said libelant and after loading said goods, the said steamship "Jeanie" proceeded on her voyage and arrived at libelant's Chomley cannery, near Ketchikan, Alaska, on the 2d day of January, 1913; that on or about the 2d day of January, 1913, said libelant delivered to said steamship "Jeanie" at its Chomley cannery approximately 5,000 cases of canned salmon for carriage and delivery to Kelley Clarke Company, Seattle; that upon the delivery of said salmon to the said steamer the purser of said steamer as agent of the charterers and operators of said steamer issued and delivered to the said libelant a bill of lading or shipping receipt covering the carriage of said canned

salmon, a copy of which bill of lading or shipping receipt is attached hereto marked exhibit "C" and made a part hereof.

VI.

That after issuing the said bill of lading or shipping receipt, and after delivering the same to the said libelant, and the acceptance thereof by said libelant, and after loading said goods, said steamship "Jeanie" proceeded on her said voyage to [29] Seattle, and after encountering extremely rough and tempestuous weather during which the vessel labored and strained heavily and shipped tremendous quantities of water on deck, the said vessel arrived at Seattle, Washington, on the 8th day of January, 1913, and proceeded to the Virginia Street dock in said port, and immediately commenced to unload her said cargo, and on or about January 10th, 1913, completed the unloading thereof.

VII.

That the said bills of lading or shipping receipts, copies of which are attached hereto marked exhibits "A," "B" and "C," and made a part hereof, were issued by the said steamer and delivered to the said libelant and accepted by the said libelant as hereinabove in this amended answer alleged, and that the said bills of lading or shipping receipts constitute the agreement or contract between the libelant and the said steamer "Jeanie" for the carriage and delivery of said consignments of salmon, and that the said bills of lading or shipping receipts constitute the only contract or agreement covering said carriage and delivery of said consignments of salmon

ever entered into between said libelant and the said steamship "Jeanie" and that the said shipment of said salmon was accepted and carried under the conditions and stipulations contained in and on the back of said bills of lading or shipping receipts and not otherwise.

VIII.

That prior to the commencement of the voyage mentioned in said libel, and at the time of the commencement of said voyage, the charterer and then owner of said steamship "Jeanie," exercised due diligence to make the said vessel in all respects seaworthy, properly manned, equipped and supplied, and claimant alleges that at all said times mentioned in said libel the said steamship "Jeanie" was seaworthy, properly manned, equipped and supplied, [30] and that the said canned salmon was at all the times properly cared for, stowed, damaged and handled, and was by it carefully and properly transported in the usual way, from the ports of shipment to the port of Seattle, and that the same was on or about January 10, 1913, duly delivered to the said consignee, and if the same was damaged while aboard said vessel, the said damage was caused by extremely rough weather encountered on the said voyage by perils of the sea, and by faults or errors in navigation or in the management of the said vessel on the said voyage.

IX.

That it is provided in each of said bills of lading or shipping receipts, among other things, as follows:

"All claims for damage to or loss of any prop-

erty to be presented to the carrier, or the nearest agent thereof within ten days from date of notice thereof—the arrival of vessel at port or place of discharge, or knowledge of the stranding or loss of vessel to be deemed notice—and that after sixty days from such date, no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property, and a failure to present such claim within said ten days, or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said carrier or any of the stockholders thereof, for any damage or loss. The claim for loss or of damage to any of the said property shall be restricted to the cash value of same at the port of shipment, at the date of shipment.”

That no claim was presented by this libellant or by the said consignee, or by anyone on their behalf to the carrier, or to any agent of the carrier, or to the said charterers, or to the said steamship, within ten days after the arrival of vessel at port of discharge, nor was any action brought against the said steamship or her owners or her master or against the said charterers for the alleged loss or damage to the said goods, within sixty days after the arrival of said vessel at port of discharge.

WHEREFORE, this claimant having fully and completely answered the allegations of the said libel herein, respectfully [31] prays that this cause be dismissed, and that it have and recover its costs and

disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant.

United States of America,

State of Washington,

County of King,—ss.

C. W. Wiley, being first duly sworn, on oath deposes and says: That he is manager of the Alaska Coast Company, claimant above named, that he has read the foregoing answer, knows the contents thereof, and believes the same to be true, and that he is authorized to, and makes this verification for and on behalf of the said claimant.

C. W. WILEY.

Subscribed and sworn to before me this 13th day of March, 1914.

[Seal]

RADCLIFFE FORMAN,

Notary Public in and for the State of Washington,
Residing at Seattle. [32]

[**Exhibit "A" to Amended Answer.**]

ORIGINAL SHIPPING ORDER.

Chilkoot Wharf.

Dec. 19, 1912.

Delivered to W. F. Swan & Company (hereinafter named Carrier) by Ala. Pacific Fisheries to be forwarded by S. S. Jeanie or by some other barge or steamer owned or controlled by said carrier, the property enumerated hereon, same being apparently in good order, except as otherwise noted, the value, weight, quantity, quality and condition of contents being unknown to said Carrier, and to be

forwarded with such dispatch as the general business of the Carrier will permit and delivered at vessel's tackle at the port of landing of

Seattle

in like good order as received (but with the option to the master to carry the property on deck, to deviate and to lighter, tranship, land and reship the said property or any part thereof, and to stop and land and to receive passengers and freight at intermediate ports or places) unto the consignee, or of shipment is to be carried beyond above named port or landing, to connecting Carrier or forwarder, he or they paying freight at tariff rates (unless otherwise agreed) on delivery, and charges advanced by Carrier and average, and to secure the payment of freight and charges the said property is hereby pledged to the Carrier. The said property to be received, held, carried and delivered by said Carrier, subject to all the stipulations and conditions hereon and on the reverse side hereof under which conditions rates are quoted and property is received for transportation, and to all of which the shipper hereby agrees; and Notice of arrival of said goods at said port is hereby waived.

NAME OF CONSIGNEE—Kelly Clarke.

DESTINATION—Seattle.

MARKED—

N. B.—Shipments must not be accepted until all above blanks are properly filled. Consignments to Order must not be accepted unless name of some resident is given to notify of arrival. Freight must be marked with proper shipping mark and full name

of place of destination—initials not accepted, such terms as “Mdse.,” “Sundries,” etc., must not be used in place of proper descriptive details.

N. of Pkgs.		Articles.	Weight.	Feet.
3077 c/s	Trolling Brand Salmon	#1	Subject to Correction.	
5903 “	Spear “ “	#1		
1658 “	Coho Wkd c			
10638	$\frac{\text{m}}{\text{V}}$		T. BANBURY, Purser. Agent.	

or Wharfinger.

Shippers desiring lower rates, when such are conditional upon shipments being released or at Owner's Risk, or upon valuation must sign release clause on the back hereof. [33]

CONDITIONS.

The barge or steamers on which the property herein described shall be forwarded, shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamers owned or controlled by said Carrier; to lighter from steamer to steamer, or to and from steamer and shore; to transfer to and from hulks, to ship by other carrier or conveyance goods destined for ports or places off the route, or beyond the port of discharge of said steamer, but under no circumstances shall the carrier be held responsible for any damage to or loss of said property after the same shall be unhooked from the vessel's tackle.

The Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters, by fire from any cause and wheresoever occurring by barratry of the master or crew, by enemies, pirates, robbers, by arrest and restraint of princes, rulers, or people,

riots, strikes or stoppage of labor, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them.

The carrier shall not be responsible for leakage of oils, liquor or other liquors, breakage of glass or queensware, injury to or breakage of glass, looking glasses, show cases or picture frames, stoves, hollow-ware, or other frail castings, or for breakage of any property packed in boxes, barrels, crates or bales when such packages do not present evidence of rough handling or improper stowage, or for any injury to the hidden contents of packages, or for breakage resulting from the fragile nature of the freight, or from chafing, wet or rust, resulting from the imperfect or insecure packing or insufficient cooperage, or the result of shipping without packing; or for loss in weight of coffee, grain or any other freight packed in bags, or for loss in weight of rice in tierces, sugar in barrels, or for the decay of perishable articles, or damage to any article arising from the effect of heat or cold, sweating or fermentation, or by reason of its own inherent vice or liability, or for loss or damage resulting from providential causes, or for damage to tobacco caused by stains to packages or by sweating or fermenta-

tion; or damage to cargo by vermin, burning, or explosion of articles on freight or otherwise, or loss or damage on account of inaccuracy or omissions in marks or descriptions, or from unavoidable detention or delay; nor for loss of specie, bullion, bank notes, government notes, bonds or consuls, jewelry or any property of special value, unless shipped under its proper title or name, and extra freight paid thereon.

Live stock to be carried at owner's risk. Pelts, dry hides, butter and eggs, boxes, and other packages, must be each and every package marked with the full address of the consignee, and if not so marked, it is agreed that the delivery of the full number of packages, without regard to quality, shall be deemed a correct delivery and in full satisfaction of this receipt.

Advance charges shall be paid to Carrier, vessel or property lost or not lost at any stage of the entire transit, and if freight and charges are not paid within thirty days after notice to consignee of arrival of vessel at port or place of destination, the Carrier may sell the said property at public or private sale and apply the proceeds in payment of freight, storage and all other charges; or the master may dispose at any time of any article of a perishable nature when in his opinion the said articles would become decayed or worthless before they could be delivered to the consignee or owner.

The property shall be received by the consignee thereof at the vessel's tackle immediately on arrival of the vessel at the port or place of delivery, with-

out regard to weather; if the consignee is not on hand to receive the property, as discharged, then the Carrier may deliver it to the wharfinger, or other party or person believed by said Carrier to be responsible, and who will take charge of said property and pay freight on same, or the same may be kept on board or landed and stored in hulks, or put in lighters, by the Carriers, at the expense and risk of the owner, shipper or consignee, and at his or their risk [34] of any nature whatever. And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent be conveyed upon said vessel to the contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property.

nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of this

The person or party delivering any property to the said vessel or Carrier for shipment, is authorized to sign the shipping receipt for the shipper. The Carrier shall in no event be liable for any injury to said property, or for any damage or loss suffered by the owner, or by the consignee thereof, unless its negligence or the negligence of its officers or servants shall have occasioned the same; and in the event that the Carrier shall become liable for any such injury, damage or loss, it shall have the

benefit of any insurance procured on the said property. The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the ship at the custom house. On delivery of the property enumerated as provided herein, this receipt shall stand cancelled, whether surrendered or not.

All claims for damage to or loss of any property to be presented to the Carrier or the nearest Agent thereof within ten days from date of notice thereof—the arrival of vessel at port or place of discharge, or the knowledge of the stranding or loss of vessel to be deemed notice—and that after sixty days from such date no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property; and a failure to present such claim within said ten days, or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said Carrier or any of the stockholders thereof, for any damage or loss. Claim for loss or of damage to any of the said property shall be restricted to the cash value of same at the port of shipment at the date of shipment.

On the happening of any accident whereby the steamer shall become disabled, the Carrier is hereby authorized to forward the freight or property to the port of delivery by other conveyances at the option of the master, and shall receive extra compensation for such service whether performed by the Carrier's own vessels or those of strangers; and in case of salvage service rendered to the freight or property

during the voyage by a vessel or vessels of the said Carrier, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

The Carrier shall not be required to deliver the property at the port of delivery in any specific or particular time, or to meet any particular market.

The Carrier shall not be held liable or responsible for any loss or damage resulting from the non-delivery or misdelivery of property, on account of its being properly marked with shipping mark and name of port of delivery, and should it be found on the cargo being discharged that goods have been landed without marks, or with marks differing from those on the shipping receipt, or with marks and numbers not distinguishable, the same shall be apportioned to the different incomplete or short consignment lots, **and consignees shall conform to such allotment.**

It is understood that the Carrier's vessels are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can secure it; and the Carrier shall not be liable for loss, detention or damage arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel, provided reasonable measures have been taken to secure efficiency.

In case the barge or steamer shall be prevented from reaching her destination by quarantine, the carrier may discharge the property into any depot, lazaretto or other receptacle, and such discharge

shall be deemed a final delivery, and all quarantine expenses of whatsoever kind on the property shall be borne by the owner thereof and shall be a lien thereof. [35]

General average shall be computed and payable according to the York-Antwerp rules of 1890, or according to American rules, as the carrier may elect.

In all cases when the work Carrier is used herein as representing or as in place of the W. F. Swan & Company it is also understood to cover and include its stockholders and vessels and the masters thereof.

These conditions and stipulations to run to all connecting water-carriers and the delivery of property or freight to a connecting carrier by land shall be understood as an acceptance by the shipper and owner of the conditions and stipulations of such shipping receipt as is used by connecting Carrier in its local business at the place of transfer.

OWNER'S RISK OR RELEASE.—When rate is named subject to owner's risk, which means that shippers assume responsibility for all damage to property in transit not arising from gross negligence of carriers, shipper must write below, the words indicating whether of breakage, chafing, leakage, etc. When two rates are provided, the lower conditioned on release, the Release Clause below must be signed by shipper, otherwise higher rate will be charged.

VALUATION.—When rate is conditioned on valuation, shipper must express on release below

valuation under which they desire to ship.

RELEASE.

I hereby certify that I desire to receive the benefits of any lower rates provided for freight conditional upon carriers being released or at Owner's Risk of* ——— or at value of ——— per ——— and in consideration of such lower rates being applied on the within-named shipment, I hereby assume all risk necessary to receive such benefits.

Shippers will sign here.

Shipper.

*Special attention is called to above clauses referring to owner's risk or release, and valuation.

[36]

[Exhibit "B" to Amended Answer.]

ORIGINAL SHIPPING ORDER.

Yes Bay Wharf.

12/31,1912.

Delivered to W. F. Swan & Company (hereinafter named Carrier) by Ala. Pacific Fisheries to be forwarded by S. S. Jeanie or by some other barge or steamer owned or controlled by said Carrier, the property enumerated hereon, same being apparently in good order except as otherwise noted, the value, weight, quantity, quality and condition of contents being unknown to said Carrier, and to be forwarded with such dispatch as the general business of the Carrier will permit and delivered at vessel's tackle at the port of landing of
Seattle

in like good order as received (but with the option

to the master to carry the property on deck, to deviate and to lighter, tranship, land and reship the said property or any part thereof, and to stop and land and to receive passengers and freight at intermediate ports or places) unto the consignee, or if shipment is to be carried beyond above named port or landing, to connecting Carrier or forwarded, he or they paying freight at tariff rates (unless otherwise agreed) on delivery, and charges advanced by Carrier and average, and to secure the payment of freight and charges the said property is hereby pledged to the Carrier. The said property to be received, held, carried and delivered by said Carrier, subject to all the stipulations and conditions hereon and on the reverse side hereof under which conditions rates are quoted and property is received for transportation, and to all of which the shipper hereby agrees; and Notice of arrival of said goods at said port is hereby waived.

NAME OF CONSIGNEE—Kelly Clarke.

DESTINATION—Seattle.

MARKED—

N. B.—Shipments must not be accepted until all above blanks are properly filled. Consignments to Order must not be accepted unless name of some resident is given to notify of arrival. Freight must be marked with proper shipping mark and full name of place of destination—initials not accepted, such terms as “Mdse.,” “Sundries,” etc., must not be used in place of proper descriptive details.

N. of Pkgs.	Articles.	Weight.	Feet.
3124	c/s Empire Brand	Subject to Correction.	
4427	" Mandarin "		
960	" Surf "		
4001	" Victor "	T. BANBURY, Purser. Agent. or Wharfinger.	
1052	" Spear "		
463	" Trolling "		
14027			

Shippers desiring lower rates, when such are conditional upon shipments being released or at Owner's Risk, or upon valuation must sign release clause on the back hereof. [37]

CONDITIONS.

The barge or steamers on which the property herein described shall be forwarded, shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamers owned or controlled by said Carrier; to lighter from steamer to steamer, or to and from steamer and shore; to transfer to and from hulks, to ship by other carrier or conveyance goods destined for ports or places off the route, or beyond the port of discharge of said steamer, but under no circumstances shall the carrier be held responsible for any damage to or loss of said property after the same shall be unhooked from the vessel's tackle.

The Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters, by fire from any cause and wheresoever occurring by barratry of the master or crew, by enemies, pirates, robbers, by arrest and restraint of princes, rulers, or people, riots, strikes or stoppage of labor, by explosion,

bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, by collisions, stranding, or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them.

The Carrier shall not be responsible for leakage of oils, liquor or other liquids, breakage of glass or queensware, injury to or breakage of glass, looking glasses, show cases or picture frames, stoves, hollow-ware, or other frail castings, or for breakage of any property packed in boxes, barrels, crates or bales when such packages do not present evidence of rough handling or improper stowage, or for any injury to the hidden contents of packages, or for breakage resulting from the fragile nature of the freight, or from chafing, wet or rust, resulting from the imperfect or insecure packing or insufficient cooperage, or the result of shipping without packing; or for loss in weight of coffee, grain or any other freight packed in bags, or for loss in weight of rice in tierces, sugar in barrels, or for the decay of perishable articles or damage to any article arising from the effect of heat or cold, sweating or fermentation, or by reason of its own inherent vice or liability, or for loss or damage resulting from providential causes, or for damage to tobacco caused by stains to packages or by sweating or fermentation; or damage to cargo by vermin, burning, or explo-

sion of articles on freight or otherwise, or loss or damage on account of inaccuracy or omissions in marks or description, or from unavoidable detention or delay; nor for loss of specie, bullion, bank notes, government notes, bonds or consuls, jewelry or any property of special value, unless shipped under its proper title or name, and extra freight paid thereon.

Live stock to be carrier at owner's risk. Pelts, dry hides, butter and eggs, boxes, and other packages, must be each and every package marked with the full address of the consignee, and if not so marked, it is agreed that the delivery of the full number of packages, without regard to quality, shall be deemed a correct delivery and in full satisfaction of this receipt.

Advance charges shall be paid to Carrier, vessel or property lost or not lost at any stage of the entire transit, and if freight and charges are not paid within thirty days after notice to consignee of arrival of vessel at port or place of destination, the Carrier may sell the said property at public or private sale and apply the proceeds in payment or freight, storage and all other charges; or the master may dispose at any time of any article of a perishable nature when in his opinion the said articles would become decayed or worthless before they could be delivered to the consignee or owner.

The property shall be received by the consignees thereof at the vessel's tackle immediately on arrival of the vessel at the port or place of delivery, without regard to weather; if the consignee is not on hand to receive the property, as discharged, then

the Carrier may deliver it to the wharfinger, or other party or person believed by said Carrier to be responsible, and who will take charge of said property and pay freight on same, or the same may be kept on board or landed and stored in hulks, or put in lighters, by the Carriers, at the expense and risk of the owner, shipper or consignee, and at his or their risk [38] of any nature whatever. And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent be conveyed upon said vessel to the contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property.

nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of this

The person or party delivering and property to the said vessel or Carrier for shipment, is authorized to sign the shipping receipt for the shipper. The Carrier shall in no event be liable for any injury to said property, or for any damage or loss suffered by the owner, or by the consignee thereof, unless its negligence or the negligence of its officers or servants shall have occasioned the same; and in the event the Carrier shall become liable for any such injury, damage or loss, it shall have the benefit of any insurance procured on the said property. The collector of the port is hereby authorized to grant a

general order for discharge immediately after the entry of the ship at the custom house. On delivery of the property enumerated as provided herein, this receipt shall stand cancelled, whether surrendered or not.

All claims for damage to or loss of any property to be presented to the Carrier or the nearest Agent thereof within ten days from date of notice thereof—the arrival of vessel at port or place of discharge, or the knowledge of the stranding or loss of vessel to be deemed notice—and that after sixty days from such date no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property; and a failure to present such claim within said ten days or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said Carrier or any of the stockholders thereof, for any damage or loss. Claim for loss or damage to any of the said property shall be restricted to the cash value of same at the port of shipment at the date of shipment.

On the happening of any accident whereby the steamer shall become disabled, the Carrier is hereby authorized to forward the freight or property to the port of delivery by other conveyances at the option of the master, and shall receive extra compensation for such service whether performed by the Carrier's own vessels or those of strangers; and in case of salvage service rendered to the freight or property during the voyage by a vessel or vessels of the said Carrier, such salvage service shall be paid for as

fully as if such salving vessel or vessels belonged to strangers.

The Carrier shall not be required to deliver the property at the port of delivery in any specific or particular time, or to meet any particular market.

The Carrier shall not be held liable or responsible for any loss or damage resulting from the non-delivery or misdelivery of property on account of its not being property marked with shipping mark and name of port of delivery, and should it be found on the cargo being discharged that goods have been landed without marks, or with marks differing from those on the shipping receipt, or with marks and numbers not distinguishable, the same shall be apportioned to the different incomplete or short consignment lots, and consignees shall conform to such allotment.

It is understood that the Carrier's vessels are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can secure it; and the Carrier shall not be liable for loss, detention or damage arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel, provided reasonable measures have been taken to secure efficiency.

In case the barge or steamer shall be prevented from reaching her destination by quarantine, the carrier may discharge the property into any depot, lazaretto or other receptacle, and such discharge shall be deemed a final delivery, and all quarantine expenses of whatsoever kind on the property shall

be borne by the owner thereof and shall be a lien thereof. [39]

General average shall be computed and payable according to the York-Antwerp rules of 1890, or according to American rules, as the carrier may elect.

In all cases when the work Carrier is used herein as representing or as in place of the W. F. Swan & Company it is also understood to cover and include its stockholders and vessels and the masters thereof.

These conditions and stipulations to run to all connecting water carriers and the delivery or property or freight to a connecting carrier by land shall be understood as an acceptance by the shipper and owner of the conditions and stipulations of such shipping receipt as is used by connecting Carrier in its local business at the place of transfer.

OWNER'S RISK OR RELEASE.—When rate is named subject to owner's risk, which means that shippers assume responsibility for all damage to property in transit not arising from gross negligence of carriers, shipper must write below, the words indicating whether of breakage, chafing, leakage, etc. When two rates are provided, the lower conditioned on release, the Release Clause below must be signed by shipper, otherwise higher rate will be charged.

VALUATION.—When rate is conditioned on valuation, shipper must express on release below valuation under which they desire to ship.

RELEASE.

I hereby certify that I desire to receive the bene-

fits of any lower rates provided for freight conditional upon carriers being released or at Owner's Risk of* ——— or at value of ——— per ——— and in consideration of such lower rates being applied on the within name shipment, I hereby assume all risk necessary to receive such benefits.

Shippers will sign here.

Shipper.

*Special attention is called to above clauses referring to owner's risk or release, and valuation.
[40]

[Exhibit "C" to Amended Answer.]

ORIGINAL SHIPPING ORDER.

Chomeley Wharf.

June 2, 1913.

Delivered to W. F. Swan & Company (hereinafter named Carrier) by Ala. Pacific Fisheries to be forwarded by S. S. Jeanie or by some other barge or steamer owned or controlled by said Carrier, the property enumerated hereon, same being apparently in good order except as otherwise noted, the value, weight, quantity, quality and condition of contents being unknown to said Carrier, and to be forwarded with such dispatch as the general business of the Carrier will permit and delivered at vessel's tackle at the port of landing of
Seattle

in like good order as received (but with the option to the master to carry the property on deck, to deviate and to lighter, tranship, land and reship the said property or any part thereof, and to

stop and land and to receive passengers and freight at intermediate ports or places) unto the consignee, or if shipment is to be carried beyond above named port or landing, to connecting Carrier or forwarded, he or they paying freight at tariff rates (unless otherwise agreed) on delivery, and charges advanced by Carrier and average, and to secure the payment of freight and charges the said property is hereby pledged to the Carrier. The said property to be received, held, carried and delivered by said Carrier, subject to all the stipulations and conditions hereon and on the reverse side hereof under which conditions rates are quoted and property is received for transportation, and to all of which the shipper hereby agrees; and Notice of arrival of said goods at said port is hereby waived.

NAME OF CONSIGNEE—Kelly Clarke.

DESTINATION—Seattle.

MARKED—

N. B.—Shipments must not be accepted until all above blanks are properly filled. Consignments to Order must not be accepted unless name of some resident is given to notify of arrival. Freight must be marked with proper shipping mark and full name of place of destination—initials not accepted, such terms as “Mdse.,” “Sundries,” etc., must not be used in place of proper descriptive details.

N. of Pkgs.	Articles.	Weight.	Feet.
2500 c/s	Bugle Brand Salmon	Subject to Correction.	
2500 c/s	Victor " "	T. BANBURY,	
<u>5000</u>		Purser.	
		Agent,	
		or Wharfinger.	

Shippers desiring lower rates, when such are conditional upon shipments being released or at Owner's Risk, or upon valuation must sign release clause on the back hereof. [41]

CONDITIONS.

The Barge or steamers on which the property herein described shall be forwarded, shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamers owned or controlled by said Carrier; to lighter from steamer to steamer, or to and from steamer and shore; to transfer to and from hulks, to ship by other carrier or conveyance goods destined for ports or places off the route, or beyond the port of discharge of said steamer, but under no circumstances shall the carrier be held responsible for any damage to or loss of said property after the same shall be unhooked from the vessel's tackle.

The Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters, by fire from any cause and wheresoever occurring by barratry of the master or crew, by enemies, pirates, robbers, by arrest and restraint of princes, rulers, or people, riots, strikes or stoppage of labor, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, by collisions, stranding

by other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them.

The Carrier shall not be responsible for leakage of oils, liquor or other liquids, breakage of glass or queensware, injury to or breakage of glass, looking glasses, show cases or picture frames, stoves, hollowware, or other frail castings, or for breakage of any property packed in boxes, barrels, crates or bales when such packages do not present evidence of rough handling or improper stowage, or for any injury to the hidden contents of packages, or for breakage resulting from the fragile nature of the freight, or from chafing, wet or rust, resulting from the imperfect or insecure packing or insufficient cooperage, or the result of shipping without packing; or for loss in weight of coffee, grain or any other freight packed in bags, or for loss in weight of rice in tierces, sugar in barrels, or for the decay of perishable articles, or damage to any article arising from the effect of heat or cold, sweating or fermentation, or by reason of its own inherent vice or liability, or for loss or damage resulting from providential causes, or for damage to tobacco caused by stains to packages or by sweating or fermentation; or damage to cargo by vermin, burning, or explosion of articles on freight or otherwise, or loss or damage on account of inaccuracy or omissions in marks or descriptions, or from unavoidable detention or delay; nor for loss of specie, bul-

lion, bank notes, government notes, bonds or consuls, jewelry or any property of special value, unless shipped under its proper title or name, and extra freight paid thereon.

Livestock to be carried at owner's risk. Pelts, dry hides, butter and eggs, boxes, and other packages, must be each and every package marked with the full address of the consignee, and if not so marked, it is agreed that the delivery of the full number of packages, without regard to quality, shall be deemed a correct delivery and in full satisfaction of this receipt.

Advance charges shall be paid to Carrier, vessel or property lost or not lost at any stage of the entire transit, and if freight and charges are not paid within thirty days after notice to consignee of arrival of vessel at port or place of destination, the Carrier may sell the said property at public or private sale and apply the proceeds in payment of freight, storage and all other charges; or the master may dispose of any time of any article of a perishable nature when in his opinion the said articles would become decayed or worthless before they could be delivered to the consignee or owner.

The property shall be received by the consignees thereof at the vessel's tackle immediately on arrival of the vessel at the port or place of delivery, without regard to weather; if the consignee is not on hand to receive the property, as discharged, then the Carrier may deliver it to the wharfinger, or other party or person believed by said Carrier to be responsible, and who will take charge of said property and pay

freight on same, or the same may be kept on board or landed and stored in hulks, or put in lighters, by the Carriers, at the expense and risk of the owner, shipper or consignee, and at his or their risk [42] of any nature whatever. And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent be conveyed upon said vessel to the contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property.

nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of this

The person or party delivering any property to the said vessel or Carrier for shipment, is authorized to sign the shipping receipt for the shipper. The Carrier shall in no event be liable for any injury to said property, or for any damage or loss suffered by the owner, or by the consignee thereof, unless its negligence or the negligence of its officers or servants shall have occasioned the same; and in the event the *the* Carrier shall become liable for any such injury, damage or loss, it shall have the benefit of any insurance procured on the said property. The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the ship at the custom house. On delivery of the property enumerated as provided herein, this

receipt shall stand cancelled, whether surrendered or not.

All claims for damage to or loss of any property to be presented to the Carrier or the nearest Agent thereof within ten days from date of notice thereof—the arrival of vessel at port or place of discharge, or the knowledge of the stranding or loss of vessel to be deemed notice—and that after sixty days from such date no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property; and a failure to present such claim within said ten days, or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said Carrier or any of the stockholders thereof, for any damage or loss. Claim for loss or of damage to any of the said property shall be restricted to the cash value of same at the port of shipment at the date of shipment.

On the happening of any accident whereby the steamer shall become disabled, the Carrier is hereby authorized to forward the freight or property to the port of delivery by other conveyances at the option of the master, and shall receive extra compensation for such service whether performed by the Carrier's own vessels or those of strangers; and in case of salvage service rendered to the freight or property during the voyage by a vessel or vessels of the said Carrier, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

The Carrier shall not be required to deliver the property at the port of delivery in any specific or

particular time, or to meet any particular market.

The Carrier shall not be held liable or responsible for any loss or damage resulting from the nondelivery or misdelivery of property, on account of its not being property marked with shipping mark and name of port of delivery, and should it be found on the cargo being discharged that goods have been landed without marks, or with marks differing from those on the shipping receipt, or with marks and numbers not distinguishable, the same shall be apportioned to the different incomplete or short consignment lots, and consignees shall conform to such allotment.

It is understood that the Carrier's vessels are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can secure it; and the Carrier shall not be liable for loss, detention or damage arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel, provided reasonable measures have been taken to secure efficiency.

In case the barge or steamer shall be prevented from reaching her destination by quarantine, the carrier may discharge the property into any depot, lazaretto or other receptacle, and such discharge shall be deemed a final delivery, and all quarantine expenses of whatever kind on the property shall be borne by the owner thereof and shall be a lien thereof. [43]

General average shall be computed and payable according to the York-Antwerp rules of 1890, or ac-

according to American rules, as the carrier may elect.

In all cases when the work Carrier is used herein as representing or as in place of the W. F. Swan & Company it is also understood to cover and include its stockholders and vessels and the masters thereof.

These conditions and stipulations to run to all connecting water carriers and the delivery of property or freight to a connecting carrier by land shall be understood as an acceptance by the shipper and owner of the conditions and stipulations of such shipping receipt as is used by connecting Carrier in its local business at the place of transfer.

OWNER'S RISK OR RELEASE.—When rate is named subject to owner's risk, which means that shippers assume responsibility for all damage to property in transit not arising from gross negligence of carriers, shipper must write below, the words indicating whether of breakage, chafing, leakage, etc. When two rates are provided, the lower conditioned on release, the Release Clause below must be signed by shipper, otherwise higher rates will be charged.

VALUATION.—When rate is conditioned on valuation, shipper must express on release below valuation under which they desire to ship.

RELEASE.

I hereby certify that I desire to receive the benefits of any lower rates provided for freight conditional upon carriers being released or at Owner's Risk of*——— or at value of —— per —— and in consideration of such lower rates being applied on the within name shipment, I hereby assume

all risk necessary to receive such benefits.

Shippers will sign here.

Shipper.

*Special attention is called to above clauses referring to owner's risk or release, and valuation.

Service of the within Amended Answer this 14th day of March, 1914, and receipt of a copy thereof, admitted.

KERR & McCORD,
Proctors for Libelant.

[Indorsed]: Amended Answer. Filed in the U. S. District Court, Western District of Washington, Northern Division, Mar. 25, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [44]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES COMPANY, a
Corporation,

Libelant,

vs.

Steamship "JEANIE," Her Tackle, Apparel, Furniture, etc.,

Respondent.

Second Amended Libel.

To the Honorable EDWARD CUSHMAN and the Honorable JEREMIAH NETERER, Judges of the Above-entitled Court:

The second amended libel and complaint of Alaska Pacific Fisheries Company, a corporation of Portland, Oregon, against the steamship "Jeanie," her tackle, apparel and furniture, and against all persons claiming any interest therein, in a cause of tort and damage to cargo, civil and maritime; filed by leave of Court, alleges as follows:

I.

That at all times herein mentioned the libelant was and now is a corporation, duly organized and existing under the laws of the State of Oregon, with its principal place of business in the City of Portland, and as such corporation was at all times herein mentioned and now is the owner of certain salmon canneries located at Chilcoot, Chomley and Yes Bay, in the Territory of Alaska. [45]

II.

That in the months of December, 1912, and January, 1913, the steamship "Jeanie" was a common carrier of passengers and freight between ports in Alaska and Puget Sound in the State of Washington.

III.

That on the 21st day of December, 1912, at Chilcoot, in Alaska, the libelant delivered to said steamship "Jeanie," for transportation to Seattle, 10,747 cases of canned salmon; and on the 27th day of December, 1912, at Yes Bay, Alaska, the libelant deliv-

ered to said steamship "Jeanie" for transportation to Seattle, 13,972 other cases of canned salmon; and on the 2d day of January, 1913, at Chomley, Alaska, the libelant delivered to said steamship "Jeanie," for transportation to Seattle, 4,737 other cases of canned salmon to be carried to Seattle on the then intended voyage, making the entire consignment of canned salmon to be carried to Seattle on said voyage of said steamship 29,657 cases, all containing canned salmon and in good order and well conditioned, and the same were received by the master of said steamship and taken on board the said vessel.

IV.

That having received said merchandise for transportation to Seattle, it became and was the duty of said vessel, her master and crew, to carry the same safely and discharge and deliver the same at Seattle in good order and well conditioned as at the time of shipment.

V.

That the total value of said 29,657 cases of canned salmon, at the time when the same should have been delivered at the termination of said voyage, if the same had been in the same [46] good condition then as when received on board of said steamship "Jeanie" would have been Eighty-five Thousand Six Hundred and Thirty and 40/100 Dollars (\$85,630.40.)

VI.

That on the 2d day of January, A. D. 1913, said steamship "Jeanie" having all of said merchandise on board, proceeded on her voyage to Seattle, where

she arrived on the 8th day of January, 1913, and there discharged her cargo, including all of said merchandise, at Virginia Street dock, for delivery to the libellant, and thereupon the libellant paid the freight stipulated to be paid for the transportation of said merchandise.

VII.

That by the misconduct of negligence of the master of said steamship "Jeanie" and her crew, a large part of said merchandise was improperly stowed in the lower hold of said ship, without being properly dunnaged to prevent the same from injury by displacement, and by contact with bilge water, and was damaged by water leaking through the interior skin of the ship; and by the negligence and misconduct of the captain and crew of the said ship, the whole interior of the space in said ship used for the storage of the cargo was in an unclean and unfit condition for the carriage of merchandise, in this: That previous to receiving the cargo for transportation on said voyage a cargo of coal in bulk had been carried in said ship and delivered at ports in Alaska and large quantities of coal and coal-dust remained in the interior of the ship and the whole of her interior space was unclean; that by reason of the unseaworthiness of said ship, she took in an unusual quantity of water on her voyage to Seattle, by leakage through seams on the deck and elsewhere in said ship, which the libellant is unable to specify. That by reason of the misconduct and negligence [47] of the master and crew of said ship the pumps were not operated sufficiently to keep the vessel free from an accumula-

tion of water in her hold, and the same coming in through the skin of the ship and in contact with the cargo, and being mixed with coal-dust, injured and damaged all of said 29,657 cases of salmon in this: That a large number of said cases were stained and blackened and rendered worthless and the tin cans containing the salmon were made wet and rusty, the labels thereon being for the most part stained, wet and discolored, and considerable quantities of coal-dust penetrated the cases to such an extent that the cans therein and the labels thereon were soiled and made unmarketable without cleaning; and the coal-dust within said cases was not discoverable without opening the same for inspection and for that reason it was necessary to open and repack each and every of the 29,657 cases and recondition several thousand cans by wiping, scouring, relacquering and relabeling in order to restore the same to marketable condition.

VIII.

That as promptly as practicable a special examination and survey of the cargo was made and notice of damage was given to the owner of the said steamer "Jeanie."

IX.

That with the knowledge and approval of the owner and in order to reduce the amount of loss by reason of said damage to a minimum, the libelant caused said merchandise to be overhauled and reconditioned and thereby incurred an expense of Forty-two Hundred and Eighty-two and 06/100 Dollars (\$4282.06), which amount was the reasonable cost of

labor and material necessary and which amount the libelant has paid.

X.

That during said period of delay and detention of said [48] merchandise for necessary reconditioning of the same, the market prices thereof declined, so that the difference in the market value thereof was the sum of Seventy-nine Hundred Thirty-five and 40/100 Dollars (\$7935.40) less at the time the work was completed than the value thereof on January 10th, 1913, the date on which said merchandise was discharged from the said steamship "Jeanie," and the libelant sustained a loss by reason of such diminished value to the amount of \$7,935.40.

XI.

That by reason of the damage of said merchandise and the necessity for overhauling and reconditioning the same, the libelant was delayed in marketing and disposing of said merchandise and deprived of the income that should have been received from the sale thereof for a period of seventy days, and thereby sustained an additional loss in the sum of Nine Hundred Eight-five and 80/100 Dollars (\$985.80).

XII.

That by reason of said delay while said merchandise was being reconditioned to make it fit for market, the libelant incurred expenses for seventy (70) days' storage, amounting to Seven Hundred Seventy-eight and 47/100 Dollars (\$778.47) and for insurance for the same period of One Hundred Fifty and 54/100 dollars (\$150.54).

XIII.

That all of said damage was caused during said voyage by the unseaworthiness of said vessel and by the bad stowage, and by the want of proper dunnage therefor on board said vessel and by the negligence, carelessness, improper conduct and want of attention of the master, his mariners and servants in loading said salmon in the hold of said vessel without removing therefrom large quantities of coal and coal-dust and in failing [49] and neglecting to keep the decks of said vessel properly caulked and the hatches properly battened down during said voyage and in failing to keep the same covered with safe, adequate tarpaulins and in failing to maintain adequate pumps on said vessel, and to operate the same and keep the water out of the bilges of said vessel and out of the hold of said vessel where said salmon was stored, whereby said salmon was permeated with coal-dust and water and damaged as above alleged, and by not having delivered the same in good order and condition and free from damage.

XIV.

That the master and owners of said vessel and their agents have neglected and failed to render any compensation to libellant for the damage sustained as aforesaid.

XV.

That the steamship "Jeanie" at the times hereinbefore referred to and at the time of the commencement of this suit was an American vessel, and at the time of commencing this suit and the filing of the claimant's stipulation to satisfy the decree to be

rendered herein, said vessel was within the jurisdiction of this court.

XVI.

Replying to the allegations contained in the Amended Answer filed herein, this libelant further alleges:

That it is not true that the several bills of lading set forth in said amended answer, or either of them, or any of bill of lading for any of the said shipments of salmon were delivered to or accepted by this libelant; and it is not true that the documents marked exhibits "A," "B," and "C," attached to said amended answer, or any of them constitute an agreement or contract between the libelant and the said steamer "Jeanie," her [50] owner, master or charterer for the carriage and delivery of said consignments of salmon; and it is not true that the said shipments of salmon or either of them were accepted or carried under the conditions and stipulations contained in and on the back of said bills of lading.

XVII.

And further replying to said amended answer, this libelant alleges:

That it is not true that no claim for the damage to said merchandise was presented by this libelant or by the said consignee or by any one in their behalf to the carrier or to any agent of the carrier, or to the said charterer or to the said steamship within ten days after the arrival of the vessel at the port of discharge.

XVIII.

And further replying to said amended answer, this libelant alleges:

That at the time of the arrival at Seattle of said steamship "Jeanie" on the voyage referred to herein, to wit, on or about the 10th day of January, 1913, the master, owner and charterer of said steamship had actual knowledge and were fully informed of the damage to said merchandise sustained on said voyage as aforesaid, and that this libelant expected to receive compensation therefor and to hold the said steamship "Jeanie" liable for whatever amount of damages should thereafter be ascertained.

That until the entire shipments of salmon were overhauled and reconditioned it was impossible to ascertain the amount of the loss by reason of the damage to said merchandise; and the work of overhauling and reconditioning the said merchandise was not completed until on or about the 20th day of March, 1913, [51] and thereafter the libelant was hindered and prevented from instituting a suit to recover damages by reason of the absence of said steamship "Jeanie" from this Judicial District until on or about the 7th day of April, 1913.

XIX.

And further replying to said amended answer, this libelant alleges:

That on the 7th day of April, 1913, for the convenience and accommodation of the Alaska Coast Company, the claimant herein, this libelant refrained from taking any legal proceedings to enforce its claim for damages against the said steamship "Jeanie," and in recognition of the existence of libelant's claim for damages to said merchandise and to preserve libelant's right to institute at a future

time and prosecute this suit an agreement in writing was made and entered into, as follows:

AGREEMENT.

THIS AGREEMENT, made this 7th day of April, 1913, in the City of Seattle, between the Alaska Coast Co. for themselves and on behalf of W. F. Swan, party of the first part, and Alaska Pacific Fisheries, party of the second part,

WITNESSETH:

THAT, WHEREAS, the steamer "Jeanie," owned by the Alaska Coast Company and under charter to W. F. Swan, party of the first part, did on the 21st day of December, sail from the port of Chilkoot, Alaska, bound on a voyage to Seattle, Washington, via various ports of call, and on a voyage south took on a cargo of salmon at the various ports of call, and on January 8th, 1913, arrived at Seattle, and on subsequent dates it was found that the cargo of salmon had been more or less damaged on the voyage south; and [52]

WHEREAS, it is the desire of the party of the first part and the party of the second part, owner of the salmon, to this agreement, to avoid all unnecessary expenses in connection with any litigation and determination of liability for the loss of or damage to said salmon;

NOW THEREFORE, in consideration of the sum of ONE DOLLAR (\$1.00) paid by the party of the second part to the party of the first part, receipt of which is hereby acknowledged, it is hereby agreed by the party of the first part that in consideration of the sum so above paid and of the premises here-

inbefore and hereinafter mentioned that the party of the second part shall at this time refrain in taking any legal proceedings in the matter of the protection of their claim by filing a libel against the steamer "Jeanie," the said party of the first part hereby undertakes and agrees that it will stand in the place of and accept services on behalf of the steamer "Jeanie" in connection with any claim against said steamer, and will at any time that the party of the second part may desire to commence litigation appear in court on behalf of said steamer, and will give security for the payment of any claim which may rightfully be due against said steamer, notwithstanding the fact that the steamer may not at the time of the beginning of the suit be within the jurisdiction of the court; and

IT IS HEREBY FURTHER AGREED by the party of the first part that it is the intention and purpose of this agreement to place the party of the second part in the same position as though the steamer "Jeanie" had been libelled and suit begun upon the date of the signing of this agreement.

ALASKA COAST COMPANY.

C. W. WILEY,
Manager.

ALASKA PACIFIC FISHERIES.

By P. A. BURCKHARDT.

H. F. SWAN,
For First Party.

B. H. CLAGHORN,
For Second Party. [53]

XX.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, the libelant prays that process in due form of law and according to the course and practice of this Court in causes of admiralty and maritime jurisdiction may issue against the said steamer "Jeanie," her engines, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that the said steamer "Jeanie," her engines, tackle, apparel, furniture, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with interest thereon from the date of filing the libel, and for costs; and that the Alaska Coast Company, the claimant herein, and the United States Fidelity & Guaranty Company, the obligors in the bond given to the United States Marshal in the sum of \$15,000 for the release of said steamship "Jeanie" from custody, be adjudged and held to abide by and perform the decree of this Court herein, in accordance with the stipulations of said bond; and for such other, further and different relief as may be according to justice and the practice of this Honorable Court in cases of admiralty and maritime jurisdiction.

KERR & McCORD,
C. H. HANFORD,
Proctors for Libelant. [54]

State of Washington,
County of King,—ss.

C. A. Burckhardt, being first duly sworn, on oath deposes and says:

I am President of the Alaska Pacific Fisheries Company, the libelant; I have read the above and foregoing libel and know the contents thereof, and the same is true as I verily believe.

C. A. BURCKHARDT.

Subscribed and sworn to this 15th day of February, A. D. 1915.

JOHN P. GARDIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within 2d Amended Libel received and due service of same acknowledged this 16th day of February, 1915.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Claimant.

[Indorsed]: Second Amended Libel. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 17, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [55]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2570.

ALASKA PACIFIC FISHERIES COMPANY, a
Corporation,

Libelant,

vs.

Steamship "JEANIE," Her Tackle, Apparel, Fur-
niture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

**Stipulation [that Amended Answer of Claimant be
Considered as Claimant's Answer to Libelant's
Second Amended Libel, etc.].**

It is stipulated and agreed by and between the li-
belant and claimant above named, that the Amended
Answer of claimant heretofore filed in this cause
shall be considered as claimant's answer to libelant's
Second Amended Libel on file herein and that all
matters contained in said Second Amended Libel
which are not expressly covered and answered by
said claimant's Amended Answer shall be considered
as expressly denied by said claimant.

Dated this 22d day of March, 1915.

KERR & McCORD,

C. H. HANFORD,

Proctors for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant and Respondent.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 30, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [56]

No. 2570.

ALASKA PACIFIC FISHERIES

vs.

Steamship "JEANIE."

Testimony Reported by U. S. Commissioner.

[57]

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*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

Steamship "JEANIE," Her Boilers, Engines, etc.,
Respondent,

ALASKA COAST COMPANY,
Claimant.

To the Honorable Judges of the Above-entitled
Court:

On this 18th day of February, 1914, the libelant appeared by its officers and by Judge C. H. Hanford, one of its proctors; and the claimant appeared by its agents and by Mr. Lawrence Bogle, one of its proctors; thereupon the following proceedings were had and testimony offered: [59]

Libelant's Testimony.

[Testimony of F. O. Burckhardt, for Libelant.]

F. O. BURCKHARDT, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HANFORD.) What is your full name?

A. F. O. Burckhardt.

Q. Where do you live? A. Portland, Oregon.

Q. State what your position or connection is with the libelant in this case, the Alaska Pacific Fisheries.

(Testimony of F. O. Burckhardt.)

A. I am the vice-president and have charge of the Chilkoot cannery.

Q. Where is the Chilkoot cannery situated?

A. The Chilkoot cannery is situated on Chilkoot inlet about fourteen miles south of Skagway.

Q. In Alaska? A. In Alaska.

Q. How extensive is that cannery?

A. As to size of pack?

Q. Yes, sir.

A. Why, we have an average pack there of about 40,000 cases.

Q. Give us some idea of the situation of the cannery with respect to accessibility from navigable waters.

A. It is on Chilkoot inlet and we have steamers loading at the dock, and they have got to truck about fifty feet across the dock in order to get to the warehouse. The warehouse is a two-story frame building, corrugated iron roof.

Q. By steamers you mean deep sea vessels?

A. Deep sea vessels. [60]

Q. The fish are received there and treated and canned and packed ready for market and shipped right from that cannery, are they?

A. Yes, they are.

Q. Delivered from that cannery to the ship.

A. Yes, sir.

Q. Were you personally present during the season of 1912 at the cannery?

A. Yes, sir, all the time during 1912.

Q. State how complete the packing was done there

(Testimony of F. O. Burckhardt.)

at the cannery to condition the goods for market.

A. Well, all the goods that we had orders for were labeled and boxed; and those that we had no labels on were boxed unlabeled and piled away in the warehouse ready for shipment.

Q. Now, the fish were put in the cans—just state the whole process of packing salmon for market.

A. From the time they are received until ready to go out?

Q. Yes. I want to get it in the evidence, just the condition of the cans and cases and everything.

A. You want me to follow the fish from the time it is received?

Q. Yes.

A. The fish are delivered from the boats to the fish elevator, and from there on to the fish dock, and from the fish dock they are taken and run through the Iron Chink, and from the Iron Chink they go to the slimers and from the slimers to the fish cutters. And from there the one-pound tall cans are filled by machine, and the half-pound flats by hand labor. Then they go through the [61] crimper and after leaving the crimper they go through the exhaust box, steam exhaust box, and come out at the other end and go through the rolled seamers; from the rolled seamers they go into the retorts and are cooked. After leaving the retorts the cans are washed in lye and water and all defective cans are removed. The next morning, when it is cold, the cans are piled and tested for defective cans.

Q. Tell how that testing is done.

(Testimony of F. O. Burckhardt.)

A. The testing is done by the Chinese workmen. They have a piece of iron or a nail and test each can separately.

Q. Tell us all about that testing, what do they do with that nail?

A. They tap a can to see whether it is a perfect can or not.

Q. Make a hole in it?

A. No, they just tap it and tell from the sound of it whether the can is full or whether it is defective.

Q. Go on.

A. At the end of the season the cans are lacquered, and such cans as we have labeled, put on our label and before going into the cases they are again tested by the Chinese workmen for defective cans. The cans are then boxed and nailed and piled away ready for shipment, in the warehouse.

Q. Now are they just put in the box with the label on or are they wrapped? A. They are wrapped—

Q. With tissue paper?

A. No, just the labels on, no tissue wrapping. And during practically all this work I am personally present at the cannery. [62]

Q. Does that complete the preparation of the goods to go into the market, to go into the trade?

A. Yes, sir.

Q. Now, the pack of 1912, was that made up in the way you have described? A. Yes, sir.

Q. When was the pack finished ready for shipment? A. When were they ready for shipment?

Q. Yes, when was this all completed for that sea-

(Testimony of F. O. Burckhardt.)

son, so that these goods were ready for shipment?

A. About the middle of October, 1912.

Q. What was the condition there at the cannery as to protecting the goods after the pack was made up, during the time intervening until you took the goods away?

A. Well, we have a two-story warehouse. The lower floor is used for storing salmon and the upper floor is a box and can loft, and the roof is corrugated iron, and the building is absolutely dry.

Q. What opportunity would there be there for injury to the goods by dampness or dirt or coal-dust?

A. Absolutely no chance for the goods to get dirty or wet. I might say further, that these goods when they were in the case and I left the cannery, were in absolutely first-class condition.

Q. (Mr. BOGLE.) As far as you know.

A. I do know that they were in first-class condition.

Q. (Mr. HANFORD.) Were you present in Seattle when the goods brought down on the steamer "Jeanie," in January, 1913, were discharged at the Virginia Street dock? A. I was. [63]

Q. How soon after the arrival of the ship, or with reference to the time of discharging, did you see them?

A. I went down the morning that she commenced discharging. I think about nine o'clock.

Q. Had you received any information, before the ship arrived, with regard to the condition of the cargo on the voyage from there here?

(Testimony of F. O. Burekhardt.)

A. We had been notified by Mr. Swan that the "Jeanie" had some damaged salmon aboard.

Q. When did you get that notice?

A. That was the day prior to her arrival.

Q. Did Mr. Swan tell you that, or did he send you a note or how did you get the notice?

A. Mr. Swan was in the office.

Q. Were you present and heard his statement?

A. I was.

Q. Did he state in what manner he had received that information? A. I do not remember it.

Q. Repeat, as near as you can, just what he said about it.

A. Well, as near as I can remember, Mr. Swan made the statement that the "Jeanie" had some damaged salmon aboard. I think he stated that he had had a cable from Ketchikan, and he wanted us to be present, or have a representative present when she started unloading.

Q. Now, you say it was about nine o'clock in the morning when you were there at the ship at the Virginia Street dock? A. Yes, sir.

Q. Had they commenced unloading salmon at that time? [64]

A. They were unloading salmon at that time.

Q. Did you notice the condition of the goods as they came from the ship?

A. I went down to look at the salmon on board the ship, in the big hatch forward, and a great many cases were wringing wet and very dirty.

Q. That was the condition you saw when they

(Testimony of F. O. Burckhardt.)

were still in the ship? A. Yes, sir.

Q. You saw a great many cases. Give us approximately some idea what you mean by "a great many". I mean were they all or a few, just here and there?

A. No, they were not all of them; but as far as I could tell at that time, but I should say that it appeared that about half of the cases that were in view were wet and dirty.

Q. Did you remain there any time or participate in any way in the matter of discharging the cargo or segregating these cases of damaged salmon from the undamaged?

A. I was there for several hours, I think.

Q. What was done to them in that regard, with regard to segregating the wet cases from the others?

A. The steamship company had a representative there, Mr. Dawson, and Mr. Hall, representing the warehouse company, and this young gentleman over here, representing the insurance company.

Q. (Mr. BOGLE.) Mr. West?

A. Yes. And my brother. And it was agreed at that time that the cargo should be overhauled and put in condition by Mr. Horner. [65]

Q. During the time of discharging the cargo from the ship, or afterwards, did you inspect or observe the condition of the salmon, the cans in the cases, as well as the outward appearance of the cases?

A. You mean generally?

Q. Yes.

A. I made a number of trips to the warehouse where the salmon was being reconditioned, and saw

(Testimony of F. O. Burckhardt.)

them open cases that apparently were all right; when they got into them they found cans that were covered with coal-dust and some of the cans would be wet.

Q. Coal-dust on the cans inside of the cases?

A. Inside of the cases. The case, apparently from the outside, was all right.

Q. Was there any way in which that coal-dust could have settled down upon the cans before they were put in the case?

A. Absolutely no chance for it.

Q. When you went on board of the "Jeanie," the morning of her arrival in Seattle, did you observe anything in regard to the condition of the hatches or covering?

A. I went down and made an examination of the tarpaulins that had been on this forward hatch, and found that they were in bad condition, and a lot of very fine pin-holes, and I asked the captain how he happened to use tarpaulins of that sort, and he told me that he had requested new tarpaulins before she left on this trip north bound—

Mr. BOGLE.—I object as incompetent and immaterial.

Mr. HANFORD.—I think it is competent, the statement of the [66] captain, he representing the ship and owners.

A. —and he had been refused new tarpaulins by the owners.

Q. At that time did he make any further statement to you in regard to the condition of the ship, or any happening during the voyage?

(Testimony of F. O. Burckhardt.)

Mr. BOGLE.—I object to that as incompetent, immaterial and hearsay.

A. He told me that the ship had struck going through Wrangle Narrows, and as I remember it, laid there one full tide.

Q. You have knowledge of the business of the Alaska Pacific Fisheries corporation, in regard to the marketing and sale and disposition of their product? A. Yes, sir.

Q. Do you know how much there was, delay in marketing this consignment of salmon, by reason of the damaged condition and the necessary reconditioning and overhauling?

A. No, not offhand without investigating the records.

Q. Through what agency does the Alaska Pacific Fisheries dispose of their product?

A. Through Kelley-Clark Company.

Q. They are the sales agents? A. Yes, sir.

(Recess taken until 1:30 P. M.) [67]

Afternoon Session—1:30 o'clock.

Mr. F. O. BURCKHARDT, on the stand for cross-examination.

Q. (Br. BOGLE.) You are vice-president of the Alaska Pacific Fisheries? A. Yes, sir.

Q. Stockholder? A. Yes, sir.

Q. And you say you were in charge of the Chil-koot cannery in 1912? A. Yes, sir.

Q. You went up at the beginning of the season, did you? A. Yes, sir.

Q. And remained there for what length of time?

(Testimony of F. O. Burckhardt.)

A. Stayed there until we closed. I think about the middle of October.

Q. All your pack was up at that time, was it?

A. Yes.

Q. And ready for market?

A. Yes, everything was boxed and ready for shipment.

Q. Had any of it been shipped down?

A. Yes, a small amount of it had been shipped; I do not remember how many cases were.

Q. What was your total pack for that season, Mr. Burckhardt?

A. The total pack was 39,000 cases at the Chilkoot cannery.

Q. This shipment on the "Jeanie" was your first large shipment of the season?

A. No, we had had several shipments out of Chilkoot as large as that. [68]

Q. Was that the clean-up of your pack?

A. This was the clean-up of the cheaper grades of fish.

Q. What grade of salmon was this?

A. Well, I think out of Chilkoot at that time there was nothing but what is known as medium red or Cohoes on the Sound, we call them Silvers.

Q. That is a late fall fish? A. Yes.

Q. Is that red salmon?

A. Yes, that is what we call a medium red.

Q. Is all of your salmon boxed in the warehouse, Mr. Burckhardt, at the cannery?

A. You mean was it boxed before we left?

(Testimony of F. O. Burckhardt.)

Q. Is the boxing of the salmon done in the warehouse itself?

A. Yes, in the warehouse. At Chilkoot, for instance, we have two warehouses. The boxing is all done in the warehouse.

Q. And the salmon is stored, after being boxed, in the same warehouse where the boxing is done?

A. We have one warehouse in back of this warehouse from which we ship, and we aim to get all our salmon in the forward warehouse, in order to cut down the distance of trucking.

Q. Well, was all of that salmon in the forward warehouse, was all of it boxed in the forward warehouse and there stored?

A. No, part of this salmon, as I remember now, was stored in the rear warehouse.

Q. You stated that from the warehouse to the dock was a [69] distance of approximately 50 feet?

A. From the warehouse to the end of the dock, from the doors.

Q. That is from the forward warehouse, is it?

A. Yes.

Q. What would be the distance from the other warehouse?

A. Well, going from there we go right through the other warehouse, we do not go to the open at all, it is good trucking from the rear.

Q. Mr. Burckhardt, the libel alleges that you shipped 10,747 cases of salmon from Chilkoot on the "Jeanie." Now, do you remember when the balance

(Testimony of F. O. Burckhardt.)

of that salmon from Chilkoot was brought down on the steamers?

A. My recollection is that this cleaned up the Chilkoot pack, although I am not positive. If necessary I could get that information for you.

Q. Well, previous to that, if this cleaned up the shipment, there was some 29 thousand cases sent down previous to this salmon?

A. Most of the Chilkoot salmon had been shipped out on the "Humboldt."

Q. Was all of this salmon of the 1912 pack, was any of it left over from the 1911 pack?

A. 1911 pack? No, it was all 1912.

Q. Was any of this box material that went into this salmon left over at the cannery for the winter of 1911-1912, or was it all new material?

A. No, I think there is ordinarily some, always some box material left over from one season to another. The percentage would be very small, I would say not to exceed—out of our pack of 200,000 cases—I would say offhand [70] perhaps material enough for five thousand cases.

Q. Left over? A. Yes, sir.

Q. In testifying as to the prices and method of putting up salmon, you were testifying as to the general method in which all salmon is put up in Alaska? There is nothing peculiar or particular about the way you put up this salmon?

A. Well, I don't know, unless we consider that we are a little bit more careful than the average packer in putting up our salmon.

(Testimony of F. O. Burckhardt.)

Q. Same process, is it not?

A. Well, outside of care and consideration, it is probably the same.

Q. The method of putting up the salmon depends largely upon your Chinese contractor, does it not? Don't he have the actual labor in putting it up?

A. He furnishes the labor and he puts up the salmon as he is directed by the man in charge. While the general method may be the same, it does not necessarily follow that it would be put up as carefully in one cannery as in another.

Q. I understand that, but when you testified that the salmon was all in first-class condition, you mean that as far as you could say, in watching the salmon being put up, etc., it was apparently in good condition. You did not inspect every case of this salmon?

A. I do not mean that at all. I mean that I made personal examination of all cans, every can of salmon that went in there. [71]

Q. That went into this shipment?

A. Yes. When the salmon is being lacquered and labeled and boxed, I am on the job from morning until night.

Q. Are you the superintendent of this cannery?

A. Yes, sir.

Q. You were not present at the cannery when this salmon was loaded aboard the "Jeanie"?

A. No.

Q. Who was at the cannery at that time?

A. The watchman.

(Testimony of F. O. Burckhardt.)

Q. He was your only representative there, was he? A. Yes, sir.

Q. You state that you had been notified by Mr. Swan that there was some damaged salmon on the "Jeanie." Was there anybody present in your office at the time Mr. Swan gave you that verbal notice?

A. I think Mr. Roberts was there at the time.

Q. Mr. Roberts is connected with your company, is he?

A. He is the purchasing agent of the Alaska Pacific Fisheries. There may have been some one else, but I am not positive.

Q. For that reason you were on the lookout for the "Jeanie" and down at the dock shortly after she arrived?

A. My recollection is that we got a telephone message from Mr. Horner after we had started unloading.

Q. Well, Mr. Burckhardt, how much salmon had they unloaded when you arrived at the "Jeanie" at the Virginia Street dock?

A. Oh, I don't know. I do not suppose that they had unloaded more than five hundred cases when I got there; I cannot tell exactly at this time.

Q. You heard Mr. Horner testify this morning, didn't you? [72] A. Yes, sir.

Q. Was this salmon being unloaded from the main hatch forward?

A. When I got there it was.

Q. And the inspection you made was by looking

(Testimony of F. O. Burckhardt.)

down into the main hatch?

A. That particular inspection was, yes.

Q. And would that be the between decks of the vessel?

A. This was just below the main hatch, below the hatch covering.

Q. That was where you found the wet and dirty cases? A. At that particular time, yes, sir.

Q. Did you watch the unloading of this vessel from day to day?

A. I saw it different times. I guess I was there every day at some time or other.

Q. The damaged cargo, as it came out of the vessel, was segregated and placed in separate piles, was it not?

A. No, it was not. They attempted to do so, but—

Q. Who attempted to do so?

A. The warehouse people.

Q. You say they attempted to do so. Do you mean that they put aside what they considered to be damaged cargo?

A. They put aside what they thought was damaged. When we got up into the warehouse we found a lot of cases up there that were wet and had gone in as undamaged, and found a lot of cases that were not wet, and still contained, after being opened, damaged cans.

Q. You say "we found." Mr. Horner found them, didn't he?

A. Well, I was there when they opened up a lot of this stuff.

(Testimony of F. O. Burckhardt.)

Q. But as that cargo came out of the vessel, the warehouse people attempted to segregate damaged cargo from the [73] good cargo? A. Yes.

Q. Do you remember the number of damaged cases which were placed on the dock?

A. No, I do not remember definitely.

Q. Did you see any of the damaged cargo that came out of the vessel, except these portions that you have testified to that came out of the forward hatch?

A. Did I see any come out of the vessel outside of the forward hatch?

Q. Yes, that was damaged?

A. Yes, I saw salmon that came out of the after hatch in the same shape.

Q. That was after they had completed the unloading of the forward hatch?

A. I do not remember whether they had finished unloading the forward hatch before they went to the after hatch or not.

Q. They were not unloading both hatches at the same time, were they?

A. I do not remember whether they were or not.

Q. Did you inspect this salmon in the after hatch to see where it was coming from, the damaged salmon?

A. I simply went, as I did in the forward hatch, I went up on the ship and looked down and I saw a lot of cases that were black and wet.

Q. You were standing on the deck when you looked down there? A. Yes, sir.

(Testimony of F. O. Burckhardt.)

Q. Where was this salmon on the deck, the between decks or was it in the lower hold?

A. It was in the between decks, when I was there they had not [74] got to the lower hold.

Q. Did you see any other damaged salmon unloaded from the vessel, except from these two hatches? A. I do not remember that I did.

Q. Now, Mr. Burckhardt, when was this meeting between Mr. Dawson, yourself and Mr. West and Mr. Hall of the warehouse company, when was that held?

A. My recollection of it is that it was held, as near as I can tell, about 11 o'clock in the morning on the day of her arrival.

Q. On the day of her arrival? A. Yes, sir.

Q. How much cargo had been unloaded at that time?

A. I do not know how much had been unloaded. I should say a couple of thousand cases, perhaps. I do not know definitely how much had been unloaded.

Q. Altogether or of the damaged cargo?

A. No, I do not think more than a couple of thousand cases altogether.

Q. Do you remember how long it took this vessel to unload the cargo? A. No, I do not.

Q. Is it not a fact that practically all the cargo was out at the time of this meeting, Mr. Burckhardt?

A. No, it is not, according to my recollection. They started unloading that morning; I forget what

(Testimony of F. O. Burekhardt.)

time they started unloading. My recollection is that immediately after going down and inspecting this salmon, we got into communication with the insurance company, and that this agreement was made that very morning. [75]

Q. Why should you get in communication with the insurance company? Did they carry insurance on that cargo?

A. I do not know of any particular reason for getting in communication with them.

Q. Did they carry insurance on your cargo?

A. This insurance company?

Q. Yes.

A. I do not remember whether they had insurance on our cargo or not. The insurance end is handled by Mr. Roberts; he can tell you more about that.

Q. Do you remember the number of damaged cases on the dock at the time of this meeting?

A. No.

Q. You say it was agreed at that meeting between all parties that Mr. Horner should go ahead and recondition the entire shipment?

A. Recondition the cargo.

Q. Was your understanding of that, that that included the entire shipment of 29,000 cases or merely—

A. My understanding was it included everything that was damaged. The only way to find out what was damaged was to break open the case and find out whether it was damaged or not.

Q. Break open the entire 29,000 cases?

(Testimony of F. O. Burekhardt.)

A. Yes, sir.

Q. After Mr. Horner had overhauled and reconditioned the 2,000 damaged cases, did he call your attention to the fact that there was some cargo in the warehouse which was damaged?

A. I think he called our attention to it the day after he started reconditioning this cargo, as well as I can [76] remember.

Q. He called your attention to the fact that there was some damaged cargo which had been stowed in the warehouse as good cargo? A. Yes, sir.

Q. And did you authorize him then to go ahead and recondition that cargo?

A. I did not authorize him to do anything.

Q. Did you go and inspect the cargo? ,

A. Yes, sir.

Q. And you gave him no authority whatever?

A. I made my report to C. A. Burekhardt, who is president of the company.

Q. And you did not notify the owners or charterers of the "Jeanie"? A. I did not notify anyone.

Q. Was it your understanding at the time of this conference, Mr. Burekhardt, that the entire 29,000 cases were to be broken into and overhauled by Mr. Horner?

A. My understanding of it was that the cargo was to be put in the same condition that it was when it left the cannery, and in order to do that it was necessary to open every case of salmon.

Q. Is it not a fact, Mr. Burekhardt, that there was a number of cases, approximately 2,000, damaged

(Testimony of F. O. Burekhardt.)

cases and more, on the dock at the time of this conference, and that it was with reference to that 2,000 cases only that Mr. Horner was authorized to recondition? A. Absolutely not.

Q. That was not your understanding? [77]

A. No, sir.

Q. In fact, you say there had been only about 2,000 cases unloaded altogether at that time?

A. As well as I remember. As a matter of fact the suggestion that this cargo be overhauled and reconditioned by Mr. Horner, was not the suggestion of anybody connected with the Alaska Pacific Fisheries.

Q. Did you inspect this cargo after the same had been overhauled by Mr. Horner?

A. Well, I did not inspect all of it. I inspected part of it. The only way a man could inspect all of it would be to stay on the job from morning until night.

Q. I say after the overhauling had been completed?

A. Well, I do not know what you would mean by inspection after the job had been completed.

Q. What was the condition of the cargo after Mr. Horner had completed the work?

A. Mr. Horner put it into first class condition; he put it in the same condition we claim it was when it left the cannery.

Q. Did you make this examination of the canvas or tarpaulin which was over the forward hatch, at the time of your first visit to the vessel?

(Testimony of F. O. Burekhardt.)

A. I made it personally.

Q. How did you know that was the canvas which was over that hatch?

A. I don't know, only what the captain told me.

Q. The captain told you that was the canvas that was over the hatch?

A. He pointed it out, and I went down and looked at it. [78]

Q. That was one tarpaulin, was it?

A. Two tarpaulins.

Q. No more?

A. He claimed to have had two over there.

Q. Did you see them both? A. Yes, sir.

Q. They were both in the same condition?

A. Yes, sir.

Q. The captain also told you that the vessel had stranded in Wrangle Narrows?

A. He told me she had struck in Wrangle Narrows.

Q. Did he tell you when that stranding took place?

A. I do not remember, excepting on her trip north bound.

Q. Before he had taken any of the cargo aboard?

A. Yes, sir.

Q. Did he tell you where he stranded in Wrangle Narrows?

A. I do not think he named the exact spot where he stranded.

Q. Did he tell you he stranded on a mud bank?

A. He did not.

Q. Did he tell you how he got off?

(Testimony of F. O. Burckhardt.)

A. I think he said he laid there over one tide.

Q. And came off on the next tide?

A. And came off on the high tide.

Q. Without any assistance?

A. I do not know whether he mentioned any assistance or not.

Q. Did he mention to you that he received any damage by that stranding? A. By stranding?

Q. Yes, sir.

A. My recollection is that he told me that he struck going [79] through the Narrows, but that he did not know what the damage was.

Q. That is your recollection of what he told you?

A. Yes, sir.

Q. Did he tell you that he worked his pumps to see whether he was making water? A. No.

Q. Mr. Burckhardt, do you know where the salmon which was loaded at your Chilkoot cannery was stowed aboard the "Jeanie," what portion of the ship? A. No, I do not.

Q. Do you know from which cannery it was that the salmon received the greatest damage?

A. I could not tell you that without looking up the office records.

Q. Is the Chilkoot cannery located upon open water or in a sheltered harbor?

A. Sheltered harbor.

Q. How was the passage, after leaving Chilkoot, between Chilkoot and Shagway?

A. Why, they sometimes strike some fairly rough weather in there.

(Testimony of F. O. Burekhardt.)

Q. Do you know where this vessel proceeded after she left Chilkoot? A. No.

Q. How was the passage from Chilkoot to Gypsum? You know where Gypsum is?

A. Right down Lynn Canal.

Q. In the winter months, is that an exposed passage?

A. Not necessarily. I would not consider it so, no. Good [80] harbor in case there is any storm; there is a good harbor all the way down there. It is safe for a small gas-boat any time of the year.

Q. When you examined the salmon upon arrival here, was the damage apparently confined to the salmon which was underneath the hatch?

A. All I could see at that time was the salmon that was underneath the hatch, because that was the only salmon that was uncovered.

Q. You did not afterwards make any examination to see whether it extended out from the hatch, did you, the wet salmon?

A. You mean to the sides?

Q. To the sides or forward or aft.

A. Well, the salmon, as it kept coming up, as they got down into it, showed still water coming out, wet.

Redirect Examination.

Q. (By Mr. HANFORD.) Mr. Burekhardt, I understand you to say that the Chilkoot salmon in this shipment was of the grade known as Silvers?

A. Yes, sir.

Q. Do you know the market value of that grade of salmon at Seattle, in the month of January, 1913?

(Testimony of F. O. Burekhardt.)

A. I cannot tell you without refreshing my memory.

(Witness excused.) [81]

[Testimony of T. A. Heckman, for Libelant.]

T. A. HECKMAN, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HANFORD.) Mr. Heckman, where were you employed, and what was your position during the salmon packing season of 1912?

A. I was at Chomly, superintendent of the Chomly cannery, Alaska.

Q. Were you there during the entire packing season? A. Yes, sir.

Q. What time was the operations for that season completed?

A. Why, sometime in the latter part of October; I am not certain as to the exact date.

Q. I wish you would give us a general description of that plant, how it is situated and the capacity of it.

A. Well, it is situated on Chomly Sound, and our pack there for that season, I think, was 85,000 cases.

Q. Is the cannery and storage rooms accessible by water navigation direct? A. Yes, sir.

Q. The fish are received there?

A. The fish are received at the cannery and go right through the process.

Q. And the cases delivered there to sea-going vessels? A. Yes, sir.

Q. State what its construction is, as regards its

(Testimony of T. A. Heckman.)

being well constructed for the preservation of the product undamaged?

A. Well, we have a wharf about 200 feet long, and we have a warehouse on that wharf, one-story warehouse for the storage of salmon, I think, 120 feet long. We have two [82] warehouses. One double warehouse building; the lower part is used for storing salmon, and the upper part of it for a can loft and empty boxes; and the other warehouse, the one-story warehouse, we use for storing salmon altogether.

Q. Well, was it inclosed and tight and well adapted to keeping clean and dry?

A. At that time the building was in good condition, absolutely.

Q. What opportunity would there be for damage by water or coal-dust in the cannery?

A. None whatever.

Q. State, if you know, what the condition of the product for that season was when it was packed, as being in condition *fit* for market.

A. It was in absolutely good condition, first class.

Q. What was the grade or quality of the salmon that was packed there and shipped out on the "Jeanie"?

A. The same as the rest of the pack, it was all the same.

Q. How would that be graded in the market?

A. You mean in what way?

Q. I want to know what the product was, what kind of salmon was it, and how would it be graded in

(Testimony of T. A. Heckman.)

the market, as first, second or cheaper grade?

A. Well, it was chums and pinks; they are all a cheap grade of fish.

Q. Do you know what the market value was in Seattle in January? A. No, I do not.

Q. What experience have you had in the salmon canning business?

A. Oh, I have been in the business about—in fact it is all [83] I have done for thirty years, I guess.

Q. What is the fact as to canned salmon, packed as these were that were shipped on the “Jeanie,” as to having any inherent tendency to deteriorate when being transported in a vessel by water?

A. None whatever.

Q. Are you acquainted with Captain Corby, master of the “Jeanie” on that trip?

A. Yes, I am, I know the captain.

Q. Did he ever make any statement to you as regards the condition of this consignment when they were taken on board the vessel from Chomly?

A. Captain Corby told me that this salmon was the best salmon they ever have taken out of Alaska, or some of the best, that there was none any better, that is as far as the boxes were concerned on the outside. Of course, he did not know anything about the contents. He said that the cases were in absolutely good condition.

Q. Can you fix the time and place when he told you that?

A. It was last week, sometime, I believe, that he told me that.

(Testimony of T. A. Heckman.)

Q. Anybody else hear him tell it to you?

A. No, I don't believe there was anybody else there at the time. There were some friends of his there at the time, but I did not know them; I do not recollect their names.

Q. What place, where did you have that conversation?

A. Well, we had it out in front of the Horseshoe saloon.

Q. On the sidewalk?

A. Near the office there, I met him on the sidewalk, out on the curb there, and we were talking.

Q. Were you here in Seattle when the "Jeanie's" cargo was [84] discharged in January?

A. No, I was not.

Q. Did you see these cases of salmon during the time that Mr. Horner was working with them reconditioning them?

A. I saw some of them, yes. I was down there several times.

Q. What part did you see? Did you see any of them before they went into the warehouse?

A. No. They were all in the warehouse when I got here. I was in San Francisco when they were taken out. He was working on the salmon when I got back.

Q. Now, state what the condition was of those that you saw, as far as you could observe.

A. Well, there was coal-dust on them, and where cases would apparently look all right outside, the labels had been damp and stained and blackened by the coal-dust.

(Testimony of T. A. Heckman.)

Q. You saw that, did you? A. Yes, sir.

Q. As they were then, without being reconditioned, were they fit for market? A. No.

Q. Were any of the boxes or cases so wet or soiled as to be unfit for use to repack in? A. Yes, sir.

Q. Can you give an idea whether few or many?

A. I could not tell you just how many. I was in there only a couple of times while they were doing the work. I was busy with other work and went down with Mr. F. O. Burekhardt a couple of times I remember of, and some of the cases looked practically all right, but when opened, they found bad cans on the inside, dirty cans. Cans dirty with [85] coal-dust where the dust had come through. It looked very much to me like the water had got in on the dry dust that was on the side of the boat or on her deck or underneath her deck, and that it had got damp and had dropped down on the boxes and run through the cracks on the side of the boxes.

Cross-examination.

Q. (Mr. BOGLE.) You were not at the cannery at the time these salmon were loaded aboard the "Jeanie"? A. No.

Q. Speaking of the dry dust that was on the sides of the ship, you mean what kind of dust?

A. Coal-dust.

Q. You know that was there?

A. I do not know it was there; I know I saw it on the boxes when they came off the ship.

Q. Did anybody suggest to you that possibly that was the way the damage occurred, when you were at

(Testimony of T. A. Heckman.)

the dock? A. No.

Q. You do not know, then, that there was any dirt or dust aboard the ship?

A. I know there is; I have been aboard of her.

Q. Always?

A. Not always, but at other times I have been aboard the ship.

Q. You were not aboard of her at this time?

A. No, I don't know; she may have been very well cleaned out for all I know, but I know she has been carrying coal right along. [86]

Q. This was not suggested to you as a possible way in which the damage occurred, by Burckhardt, or any other interested party? A. No.

Q. At the time you went up to see this salmon as it was being overhauled by Mr. Horner, did you stay there for any length of time watching operations?

A. Oh, I was probably there about an hour sometimes or an hour and a half, something like that, walking around watching them.

Q. Were any of these cases opened up which were found to be in perfect condition when opened up?

A. Yes, on the outside, perfect condition on the outside.

Q. Were any of the cases opened up which were in perfect condition outside and inside, after they had been opened up?

A. I did not notice any at the time there.

Q. At the time you were there every case opened up was damaged?

(Testimony of T. A. Heckman.)

A. More or less damaged cans on the inside there, dust and stuff.

Q. That was during the hour that you watched?

A. Yes.

Q. On both occasions? A. On both occasions.

Q. You did not see them open up a single case—

A. I did not see them open up a single case that was perfect.

Q. You went there with Mr. Burekhardt, did you?

A. I went with Mr. Burekhardt twice, and I was down there myself alone, I think a couple of times after that. [87]

Q. You went down for the purpose of finding out the condition of this salmon, did you?

A. No, I did not.

Q. Just out of curiosity?

A. No, I went down there on some other business.

Q. And spent an hour watching them recondition them?

A. And I went in there and saw what they were doing there with the salmon.

Q. You have seen them recondition salmon, before, have you not? A. Yes, sir.

Q. Is it an unusual thing for them to be reconditioning or overhauling salmon on its arrival at Seattle?

A. Not in big quantities like that; I have seen them recondition small batches of salmon.

Q. You say the captain of the "Jeanie" made this statement to you about the condition of the salmon about a week ago?

(Testimony of T. A. Heckman.)

A. I met him about a week ago; and he has made it, not only then but made it a half dozen times during the winter when I have seen him, because I met him very often.

Q. How did the conversation happen to come up to this subject? Had you been requested to see the captain to get a statement out of him?

A. No, I had not. The last time when this came up was when this case was coming up, that I spoke about it. When he came down last fall he came and told me himself, without my ever asking him a question at all whatever, that the salmon was in good condition when they left the cannery, that is the boxes were. Of course he did not know anything about the contents of the boxes. He said the boxes were perfectly dry and in good shape. [88]..

Q. When they left the cannery?

A. When they left the cannery. And when I saw him a week ago, why, I asked him then if he remembered telling me this and he said yes, he says, it is a fact.

Q. This conversation took place in front of the Horseshoe saloon, did it?

A. I do not recollect whether the Horseshoe—

Q. Quite sure it did not take place inside by the bar? A. No, it was outside on the curb.

Q. Had you just come out of the bar?

A. Well, I believe we did have a drink.

Q. What is the distance of your warehouse, where this salmon was located at Chomly, to the end of the wharf where the vessel would be lying?

(Testimony of T. A. Heckman.)

A. Why, it is 16 feet from the front of the dock to the 1st warehouse, the warehouse that runs along the dock.

Q. Was all of this salmon loaded from the first warehouse? A. No.

Q. What was the distance to the second warehouse from the dock?

A. From the warehouse on the dock to the building that run endwise on to this warehouse is twenty feet.

Q. That would be a haulage of twenty feet from the warehouse to the ship?

A. Twenty feet from the cannery to the small warehouse and then from the small warehouse to the ship.

Q. Was it a covered space from the cannery to the warehouse? A. No.

Q. What was that distance, twenty feet, you say?

A. About twenty feet.

Q. That was an open space? [89]

A. That was an open space.

Q. Open space from the end of the warehouse to the end of the dock was about 16 feet?

A. Yes, sir.

Q. Was this the last of the pack which you sent down on the "Jeanie," if you know.

A. No, there was more there.

Q. When did the balance of it come down?

A. Why, I don't remember when it came down. A good deal of it came down in the spring on the "Humboldt."

(Testimony of T. A. Heckman.)

Q. In the spring, about what month?

A. Oh, along in April, the middle of April.

Q. The last of your shipments came down on the "Humboldt," did they?

A. Well, all except what the "Jeanie" brought.

Q. That salmon was all cheap grades, dog salmon and humpbacks. A. It is chums.

Q. Chums are dog salmon are they not?

A. No, they are called chums.

Q. When they are packed, but before that they are called dog salmon?

A. No, it is a local name for them, but the regular name is chum salmon.

Q. And the pinks are humpbacks?

A. Yes, the pinks are.

Q. All that you know, Mr. Heckman, about the damage to this salmon was what you saw on one or two occasions when you were at the warehouse where it was being overhauled?

A. Yes, that is all. [90]

Q. On the two or three occasions when you were up there? A. Yes.

Q. And you personally know nothing about the condition of the salmon when it left Chomly on the steamer? A. No.

Q. Do you know where the salmon was loaded on the steamer? A. At the cannery?

Q. Yes, that is what portion of the steamer it was loaded on? A. No.

Q. The Chomly cannery is located near Ketchikan, is it not?

(Testimony of T. A. Heckman.)

A. About thirty-five miles from Ketchikan.

Q. Is there any open stretch of water between Ketchikan and the cannery, or is that sheltered?

A. It is sheltered for any sea-going boat.

Q. Experience some pretty heavy weather in there in the winter, don't they?

A. No, not for this vessel.

(Witness excused.) [91]

[Testimony of W. J. J. Roberts, for Libelant.]

W. J. J. ROBERTS, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Hanford.) What business connection have you with the Alaska Pacific Fisheries?

A. I am purchasing agent for the company; also handle their insurance.

Q. Were you acting in that capacity last year, in the winter of 1912-1913? A. I was.

Q. Do you know Mr. Swan? A. Yes, sir.

Q. What is his full name? A. Walter F. Swan.

Q. Do you know what connection he had with the steamer "Jeanie" at that time, in January, 1913?

A. Yes, I understand he had her under charter.

Mr. BOGLE.—I object unless he knows. I do not know that it is material.

Q. Well, do you know that he acted in the business of the steamer?

A. I know he had her under charter, for the reason I wrote his insurance on his freight moneys and his freight earnings on the "Jeanie."

Q. Were you present in the office of the Alaska Pacific Fisheries when he came there and made some

(Testimony of W. J. J. Roberts.)

report about the cargo before she arrived?

A. Yes, I was there.

Q. Who else was present when he came?

A. Why, Mr. F. O. Burckhardt was there; I do not remember whether Charles A. Burckhardt was there or not. [92]

Q. What statement did Mr. Swan make about it?

A. He stated that he had been advised by wire that there was some damaged salmon on board and suggested that I notify the insurance companies that carried the insurance on the cargo.

Q. Did you act on that suggestion?

A. I did. I notified F. A. Frederick, the general agent for the company carrying the insurance.

Q. When was that with reference to the time of the arrival of the "Jeanie"?

A. My recollection is that it was about two days before she got in, possibly three days.

Q. After the arrival of the "Jeanie," did you have any conversation with her captain?

A. Yes, I did. I asked Mr. Swan to send the captain in as soon as he came.

Q. What is the captain's name?

A. Captain Corby.

Q. Did he come and did you have an interview with him?

A. Yes, he came up very shortly after the steamer arrived; I think shortly after the office opened in the morning and I asked him with regard to the damage and how it was caused, and he said that the water got in through the hatches. I asked him if

(Testimony of W. J. J. Roberts.)

he did not have his hatches properly battened and he said he had but the tarpaulins were old and leaked; and he also stated that he asked for new tarpaulins but had not received them.

Mr. BOGLE.—I object to that latter statement as being hearsay.

Mr. HANFORD.—I think it is relevant.

Q. Did he make any further statement in regard to the condition [93] of the ship?

A. In regard to the condition of the ship? Not that I can recollect at this time.

Q. Did he refer you to anyone else to give you information about that?

A. Oh, he did, not *not* at this particular time; it was at another time, later on.

Q. Can you fix the time of it?

A. It was about the next trip of the "Jeanie," probably about thirty days later, and would bring it in February sometime, and I asked him to give me some information in regard to the "Jeanie's" condition. He said that he could not do it, that he could not say anything against the ship at all. And he said he knew which side his bread was buttered on, but if you want to find out about her go to Captain Jensen, he knew her thoroughly.

Q. Did he in either of these conversations or in any conversation, state anything to you in regard to the events of the trip going north or coming back?

A. Yes, he told me that they had stranded going north, and I asked him if he had had a survey and he said not. And I asked him if it was before he had

(Testimony of W. J. J. Roberts.)

taken on any cargo of salmon and he said it was. And when I asked why he did not hold a survey he said he did not think he was damaged.

Q. Did he make any statement to you in regard to the condition of the pumps?

Mr. BOGLE.—I object to this testimony as not being the best testimony; the captain is available and you can call him as a witness and get his direct testimony. [94]

A. I don't remember anything.

Q. Did you learn from him anything about the cargo that was carried in the ship going north?

A. Yes. He carried coal going north, bulk coal.

Q. Did he tell you when and where it was discharged?

A. He did, but I do not recollect where it was discharged. And I asked him if he had any of our cargo on board when he went to Yes Bay and he told me he had the Chilkoot cargo on board, and they had some very heavy weather going to Yes Bay.

Q. Did you learn from him whether he had taken out all the coal from the ship before the salmon was taken in?

A. No. My recollection is that it was not all taken out. There was some in the hold aft. He had some of the salmon in. I do not know whether it was after the Chomly cargo was in, but I am sure it was after the Chilkoot cargo was on board that he unloaded some of this coal.

Cross-examination.

Q. (Mr. BOGLE.) What insurance did you carry

(Testimony of W. J. J. Roberts.)

on the "Jeanie," Mr. Roberts?

A. You mean for Swan?

Q. Yes.

A. Why, we carried insurance on his freight money; he insured his freight money on the north and south bound trips.

Q. Did he lose any of his freight money on this voyage? A. No, not that I know of. [95]

Q. Then what was your interest in interviewing the captain of the vessel, as an insurance man?

A. Well, I was handling the insurance for the Alaska Pacific Fisheries, and our policy only covers damage caused by sinking, stranding, burning or coming in collision; it does not cover any loss caused by leaking, leaking in her decks or taking in water, unless she sinks, is stranded, burns or comes in collision with some object other than water. And my reason for seeing the captain was Mr. Frederick stated there was no loss under out policy.

Q. Mr. Frederick represented the underwriters, did he?

A. Yes, the underwriters of the cargo.

Q. Had he previously seen the captain?

A. He had not.

Q. How did he know that there was no loss, how did he know how the loss had occurred?

A. From telegraphic reports. They keep in close touch with these matters; he usually knows before a vessel reaches port as to the cause of any damage. For instance, he would know whether she had been wrecked or come in collision, or whether she had

(Testimony of W. J. J. Roberts.)

just taken water in through her hatches or deck seams.

Q. Her policies covered ordinary perils of the sea, Mr. Roberts?

A. Only the perils that I have enumerated.

Q. Only those perils?

A. Yes. It is what is called an English form of policy.

Q. The ordinary form of English policy, is it?
[96]

Q. You did not collect any insurance on that policy for damage to the cargo? A. No.

Q. You put no claim in?

A. No, we simply notified Frederick that the cargo was damaged. He said we had no claim.

Q. Has Frederick any interest in this litigation?

A. No, sir.

Q. The underwriters any interest in this litigation? A. None whatever.

Q. You made no formal claim against the underwriters? A. No.

Q. That was your sole interest in interviewing the captain of the vessel, to find that out. A. Yes.

Q. You are still connected with the Alaska Pacific Fisheries? A. Yes, sir.

Q. Do you remember where Mr. Swan said he had received the wire, stating that there was some damaged cargo aboard the "Jeanie"?

A. He was in our office in the Mutual Life building.

Q. I mean where the wire was sent from.

(Testimony of W. J. J. Roberts.)

A. Oh, no, he did not state; in fact I did not ask the question.

Q. Do you know whether or not she made any other call after leaving Ketchikan?

A. Not that I am aware of. That is something I would not know about.

Q. The Chomly and Yes Bay shipments were taken on board [97] in the neighborhood of Ketchikan, were they not?

A. Well, I understand Chomly is about 60 miles from Ketchikan, and Yes Bay is about forty. I may be mistaken in regard to the number of miles, but not very far.

Q. Is there any exposed water between Chomly cannery and Ketchikan or Yes Bay cannery and Ketchikan?

A. I am not familiar with the waters.

Q. You are not familiar with the trip made by the "Jeanie"?

A. No, I have never been there; all I know about it is from reports I have read of it.

Q. You state that the captain told you that the water got in through the hatches causing the condition of the—because of the condition of the canvas or tarpaulins? A. Yes, sir.

Q. Did he state through what hatches the water had gotten in?

A. No, he did not. But I was at the dock there when they were unloading the cargo.

Q. Did he state to you that all the damage occurred through water coming through the hatches?

(Testimony of W. J. J. Roberts.)

A. No, he did not.

Q. Did he say that any water came through the deck of the vessel, or that she had opened up any of her seams through stress of weather? A. No.

Q. Did he tell you in what manner the hatches were fastened and secured before the vessel left Ketchikan and before she left on the voyage with this cargo aboard?

A. No, he did not. He just made the statement when I [98] asked him, I says, "How did the water get through the hatches, were they not properly battened"? "Yes," he said, "but my tarpaulins were old."

Q. In order to take water through the hatches, you would have to take seas over the deck, the deck would have to be awash before she would take water down the hatches? A. Yes, sir.

(Witness excused.)

Hearing adjourned until 10 A. M. February 19, 1914. [99]

[Testimony of W. T. Isted, for Libelant.]

Seattle, February 19, 1914, 10 A. M.

Present: Judge HANFORD, for the Libelant.

Mr. LAWRENCE BOGLE, for the Claimant.

W. T. ISTED, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HANFORD.) What is your full name?

A. W. T. Isted.

Q. You live in Seattle? A. Yes, sir.

Q. What is your business or occupation?

(Testimony of W. T. Isted.)

A. I am adjuster of fire and marine losses and appraiser of damaged merchandise.

Q. Did you see the cargo or any part of the cargo of salmon brought from Alaska on the steamship "Jeanie" in January, 1913? A. Yes, sir.

Q. Can you fix the date approximately when you observed it?

A. Somewhere around the 29th of January, a year ago.

Q. That was after all the cargo had been taken out of the ship?

A. That was after all the cargo had been taken out of the ship.

Q. Where was it when you saw it?

A. There was a large part of it on the Virginia Street dock, and the greater part of it was in the warehouse across the street.

Q. Was there any work being done on it then?

A. Yes, sir. The cargo on the dock was being taken out of the cases, and they had a lacquering machine there [100] relacquering the cases. And they had, I guess, ten or twelve girls wiping the cans and putting on new labels. And then they were packing it in new cases. Of course there was a lot of it over in the warehouse there that nothing was done to it at that time.

Q. If you noted anything in regard to the condition of the cans or cases, I wish you would state just what you did observe.

A. Well, the cases were all discolored, that is about 1250 of them, approximately, were very badly discol-

(Testimony of W. T. Isted.)

ored; they were black. And then the cases that were in the warehouse; I opened probably twenty-five or thirty cases, scattering in different parts of the warehouse, and they were covered with coal-dust; and we took the tops off the cases and the cans inside were covered with dust. In some cases there was a great deal more coal-dust than in other cases. It was light and you could take your hand and wipe it all off. The boxes were in terrible shape, the boxes on the wharf.

Q. The labels on the cans, what did they show?

A. Of course some of the cans were rusty, and they were wiping them off and relacquering them. Of course I did not count them, but the man on the dock there, Horner's foreman, said—

Mr. BOGLE.—I object to what the foreman said as incompetent.

Mr. HANFORD.—Do not repeat what the foreman said.

Q. This blackness that you speak of, was that all dry or was it in some instances dry and other instances wet?

A. The cases were soaking wet that were black, and in [101] some cases the coal-dust on the cases that we opened was wet. The majority of the cases in the warehouse were covered with coal-dust.

Q. Dry?

A. Dry. Yes. Take a handkerchief and wipe it all off.

Q. How were these cases as to being tight or open or cracks that would admit the sifting of dry dust inside?

(Testimony of W. T. Isted.)

A. Well, they were regular salmon cases. In the corner, I should imagine there is about an eighth of an inch where the side of the case comes up to the top of it; of course coal-dust could get in through that opening. They are not waterproof, you know, these cases.

Q. What would you say in regard to the condition of these cases, or the cans, as to being marketable without being reconditioned?

A. Why, it would be foolish to put these wet cases out on the market, for the reason that by the time they reached the consumer, the cases would have been blown and other cases were so badly discolored that if you sold them to a retailer and the retailer attempted to put them out over his counter to the trade, you would have had to have sold them at a loss. The retailer would have complained and probably would not have taken them, as damaged goods or something.

Q. These particular cases that you opened, what was the apparent condition on the outside? Did they show damage on the outside before you opened them?

A. Yes, there was a great many of them stuck up, that looked damaged. And then some of them that looked O. K. I had men pull out of the tier and open up, while [102] the exterior appearance looked good, the inside was covered with coal-dust.

Cross-examination.

Q. (Mr. BOGLE.) Mr. Isted, who sent you down there to examine this cargo?

(Testimony of W. T. Isted.)

A. Roberts. Roberts asked me to go down there. He did not know whether it would be an underwriter's job, but to go down and survey and make report.

Q. That is W. J. J. Roberts of the Alaska Pacific Fisheries?

A. He is the Roberts that placed the insurance on it, W. J. J. Roberts.

Q. Did you make a survey and give a report?

A. Yes, sir, I did.

Q. Have you a copy of that report?

A. No; he had one in the office.

Mr. BOGLE.—I would like to have a copy of that report. If he has made a written report of his examination of this cargo I would like to have it.

Mr. HANFORD.—I think you ought to have called for it. It would not be competent evidence for us.

Mr. BOGLE.—I will make formal demand.

Mr. HANFORD.—I will ask Mr. Roberts to furnish it for him if he can.

Q. You said you examined this cargo about the 20th of January, 1913?

A. Offhand, without having the papers with me, yes.

Q. Approximately.

A. Approximately, within two or three days.

Q. At that time, Mr. Isted, had all the salmon been unloaded [103] from the "Jeanie"?

A. Yes, sir.

Q. And a portion of the salmon was still on the dock. Did you keep any record of the number of

(Testimony of W. T. Isted.)

cases that were left on the dock?

A. No. I simply took the word of Mr. Horner's foreman, as I was going to tell you.

Q. These cases all showed damage from being wet, didn't they?

A. They were all wet and they were covered with coal-dust as well.

Q. But these all showed exterior evidence of damage?

A. They all showed exterior damage, being wet, these cases on the dock.

Q. You say that the biggest part of the shipment was in the warehouse. Did these cases show any exterior evidence of being damaged, except this fine coal-dust which you saw?

A. There was cases scattered here and there through it that were stained, like as though stained by water.

Q. Had been wet?

A. Had been wet. A corner of a box or the side of it, something of that sort.

Q. Could you give us any idea, Mr. Isted, approximately the number of cases that you found in the warehouse, which showed them all being wet or having been wet?

A. No, I could not do that, for the reason that they were stored in two different places in the warehouse. We simply climbed over them and went down through the passageways. I paid more particular attention to the [104] cases that looked soaked for the reason that if there was any damage there we

(Testimony of W. T. Isted.)

wanted to know it. It would be impossible, Mr. Bogle, to say how many, or give an idea.

Q. Was the proportion large or small?

A. Very small, very small.

Q. The large majority of these cases in the warehouse apparently from the outside were all right, were they?

A. No, they were dirty looking, as I say, I took my handkerchief and wiped the tops of the cases off and the sides, to see what it was. The handkerchief showed it was just black.

Q. That was the only exterior evidence of damage, this loose black dry dust?

A. Loose, black dust of some kind.

Q. That could be wiped off with a dry cloth, could it?

A. It could be wiped off, but the box would still look damaged.

Q. It would show some evidence of being dirty?

A. It would show some evidence of smoke or something of that sort.

Q. Now, Mr. Isted, I did not quite understand what you meant in saying there were approximately 1250 cases discolored, was that out of the pile that was on the dock? A. These were on the dock.

Q. You did not give us any estimate of the cases which were damaged or discolored in the warehouse. I understand you could not approximate it.

A. I could not approximate that.

Q. And out of this shipment you opened between 25 and [105] 30 cases— A. That looked good.

(Testimony of W. T. Isted.)

Q. What damage did you find to these 25 or 30 cases, were they all damaged inside?

A. They were covered with coal-dust.

Q. All of them, every one you opened?

A. The greater majority of them. I did not keep tally of them. I just went through it the same as we would when we agree of damages with a man for a loss, picking one here and there.

Q. Did you find any of these cases which were not damaged at all, Mr. Isted?

A. There was one or two, Mr. Bogle, that were not covered with dust.

Q. These cases that you examined, it was all dry dust, was it not? A. It was dry dust.

Q. Mr. Isted, what experience have you had in the sale or disposal of salmon, to either wholesale or retail trade? Have you ever had any experience?

A. Yes, I handled the cargo of the "Batsea" (?) forty or fifty thousand cases. She was ashore and under water. I disposed of that in British Columbia. And we had the P. P. N. on the "Cottage City" once, and I handled that for the owners.

Q. That was all damaged cargo?

A. All damaged cargo, yes.

Q. You were not in the salmon business to any extent, you have not handled any packs?

A. No, simply as the underwriters turn the loss over to us. [106] It is up to us to dispose of it, arrange a sale or agree on damages with the assured, or something of that sort.

Q. These wet cases, what would be the objection of

(Testimony of W. T. Isted.)

putting these on the market; there would be no damage to the salmon itself?

A. Why yes, after cases are wet with salt water, there is more or less corrosion, and inside of thirty or sixty days they commence to swell, and the minute the air gets at them they pop.

Q. The cases?

A. The cans, the contents of the cases. The case itself will last forever, you know, except when you get to handling them and the nails are rusty and they will come out.

Q. The case being wet or dirty does that hurt the product?

A. It does. The sale of it, Mr. Bogle, because if you sell any merchant a damaged case, he will immediately put in a claim for damages; a great many of them will not accept them.

Q. That would be if the product itself, that is, the labels or something, damaged?

A. The outside appearance of the case. A man goes to work, take a salmon broker, and he will sell salmon, and if it comes dirty to some country merchant, he will object to it; something of that sort. We always in losses make allowance for that.

Q. What would be the effect of fresh water on cases, Mr. Isted, would that also blow the cans?

A. No. My experience is that fresh water does not damage [107] the goods seventy-five per cent as much as salt water. I do not know why it is, except the action of the salt on the tin eats into it quicker.

Q. Did you make any examination to determine

(Testimony of W. T. Isted.)

whether or not this damage was a salt-water damage or fresh-water damage?

A. No, sir, I did not. I made no test whatever.

Q. You do not mean to say that you made a minute examination of the entire shipment? A. No.

Q. As I understand you, you went down to the dock at the request of Roberts and found some 1250 cases, approximately, discolored and wet, on the dock. A. Yes, sir.

Q. And went into the warehouse and examined some twenty-five or thirty cases and found coal-dust on the majority of them?

A. I examined the whole cargo, went right through the whole cargo, went down the alleyways, the place where the trucks go, and sized up the entire cargo.

Q. Well, how was this cargo stacked, three or four boxes high?

A. About five tiers high, five to the tier.

Q. Five boxes. You did not examine each box separately?

A. No, I just simply walked along. I noted this one bad; this one not quite so bad; and we climbed over the top of them and over the center of them, and I took a case here and a case there.

Q. How long did you spend in this examination?

A. About an hour or an hour and a half.

Q. Did you find out of the 29,000 and some odd cases, any [108] amount of good cases, in the course of your examination?

A. Yes, there were lots of good ones, Mr. Bogle; they were not all damaged.

(Testimony of W. T. Isted.)

Q. The damage out of the 29,000 was small in percentage, was it not?

A. Well, offhand, I should say that probaly it was about half and half discolored and dirty..

Q. That there were 14,000 cases discolored?

A. About that; that is, looking at them as I could.

Q. Mr. Isted, could you approximate the number of cases which had been damaged or discolored by water, that is solely by water, and the number of cases which were damaged or discolored either wholly or partially by coal-dust?

A. Offhand, Mr. Bogle, I should say of the cases in the warehouse, there was probably ten per cent that were discolored here and there.

Q. By discolored you mean water discoloration?

A. Showed signs of water being on them.

Q. Any signs of coal-dust on that ten per cent?

A. Oh, yes, the coal-dust being on the case they blackened them more.

Q. All that ten per cent, they all showed coal-dust damage?

A. They all showed coal-dust damage. And probably thirty or forty per cent of the remainder were dirty-looking.

Q. What was that from?

A. I would say from this black or coal-dust.

Q. Did you make any minute examination to determine whether it was or was not coal-dust?

A. No, sir. I simply took my handkerchief and went over the [109] cases; and cases that looked all right I would take my handkerchief, and it got

(Testimony of W. T. Isted.)

pretty black before I was finished with it.

Q. Mr. Isted, your examination was cursory, you did not examine each case top and bottom and sides?

A. Oh, no, I could not.

Q. And the way they were piled you could only see the ends of the cases? A. Ends of the cases.

Mr. BOGLE.—That is all, unless we get this report; in that case I may want to examine him again.

Redirect Examination.

Q. (Mr. HANFORD.) Do you know Walter Swan?

A. Yes, sir.

Q. What connection did he have with the "Jeanie" in January, 1913?

A. He was agent and operated the vessel.

Q. Did you have any conversation with him about the damage to the Alaska salmon?

A. Yes, I got my information from him.

Mr. BOGLE.—I object as improper redirect examination.

Mr. HANFORD.—I will recall him to prove admissions by Swan.

Q. What statement, if any, did he make to you in regard to or an attempt to explain the coal-dust or coal-black on this cargo?

Mr. BOGLE.—I object, on the ground that Swan is not a party to this suit, and any statement made by him to Mr. Isted is not competent evidence against the claimant and respondent. [110]

Mr. HANFORD.—We claim he represented the owner *pro hac vice* on that voyage.

(Testimony of W. T. Isted.)

Mr. BOGLE.—He is not a party to this suit.

Mr. HANFORD.—No; the ship is not a party except as being the medium through which we reach the owners.

Mr. BOGLE.—The real owner is the Alaska Pacific Fisheries.

Mr. HANFORD.—The owner for the voyage would be the charterer.

Q. State, Mr. Isted, if he made a statement to you, what he did say about the coal?

Mr. BOGLE.—I object, unless it is shown when the statement was made.

Q. Fix the time.

A. Well, after I looked at the salmon, I saw, Mr. Swan, to get what information I could as to how it was damaged, and Swan said that they had some coal for some cannery, I cannot think of the name of it, that they were to have delivered before they loaded this salmon, but for some reason they did not go there, and they went—

Mr. BOGLE.—Was Mr. Swan on board the vessel?

A. No, he was not to my knowledge.

Mr. BOGLE.—I object.

Mr. HANFORD.—I do not think that is competent.

Q. But as to the fact whether she did carry a cargo of coal in bulk. Did he make a statement about that, that is what I should like to know?

A. Yes, he said there was this coal on the vessel that she was to deliver to a call port and she did not

(Testimony of W. T. Isted.)

go there. Then he said there was this coal in bulk on the vessel and was discharged after part of the salmon was taken aboard. [111]

Mr. BOGGLE.—I want my objections to run to all this testimony because Swan was not on board the vessel and had no personal knowledge when this coal was discharged. I want my objection to run to all this as being incompetent.

Q. (Mr. BOBLE.) When did Swan make this statement to you?

A. On the afternoon that I examined this merchandise.

Q. Mr. Swan resides in Seattle? A. Yes, sir.

Q. He is not an officer of the ship?

A. Not to my knowledge; he was just the charterer.

Mr. BOGGLE.—I renew my objections.

(Witness excused.)

Recess taken until 2 P. M. [112]

[Testimony of R. E. Small, for Libelant.]

Afternoon Session—2 o'clock.

R. E. SMALL, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HANFORD.) What is your name?

A. R. E. Small.

Q. What business are you engaged in, or what institution are you connected with?

A. Kelley-Clark company.

Q. What is the general business carried on by that concern?

A. General brokerage and commission business.

(Testimony of R. E. Small.)

Q. To what extent were they engaged in marketing Alaska canned salmon in the years 1912-1913?

A. To a very large extent.

Q. Give us an idea of the volume of the business, the proportion of the Alaska salmon that they handled, in cases? A. In dollars and cents?

Q. In cases.

A. Approximately eight hundred to nine hundred thousand cases.

Q. Were you personally acquainted with the market price of Alaska salmon in January, 1913?

A. Yes, sir.

Q. What was the market price of Alaska chums on January 10, 1913, per case?

Mr. BOGLE.—I object as incompetent and immaterial. There is no claim in here of loss of salmon or loss of market.

Mr. HANFORD.—We allege the value of the shipment, and that is all I want to prove.

Q. State the market price of chums. [113]

Mr. BOGLE.—I renew my objection.

A. 62½ cents a dozen.

Q. That would be how much per case?

A. That would be \$2.50 a case.

Q. The quality of the salmon generally—pinks, what was the price of that?

A. 65 cents a dozen or \$2.60 a case.

Q. And the price of medium reds?

A. \$1.15 a dozen or \$4.60 per case.

Q. Did Kelley-Clark Company have the marketing of from the Alaska Pacific Fisheries that were

(Testimony of R. E. Small.)

brought here on the steamer "Jeanie" in the month of January, that were reconditioned on account of damage? A. Yes, they did.

Q. Do you know the number of cases that were in that consignment?

A. Yes, I have my record with me. Approximately 10,498 cases of chums.

Q. (Mr. BOGLE.) What is that you are reading from?

A. From my own personal memorandum, off my own books.

Q. A memorandum made by yourself?

A. Not personally myself. Made by one of my clerks in the office there. —

Q. (Mr. HANFORD.) To get this in the record succinctly: That number of chums at \$2.50 per case would be of what gross value? A. \$26,245.

Q: Now the next quality, pinks, what was the quantity? A. 14,373 cases.

Q. Total value? [114] A. \$37,369.80.

Q. The total number of cases of medium red?

A. 4,786. Valuation, \$22,015.60.

Q. Was there any fluctuation in the market price of these goods between the 10th of January and the 20th of March, 1913? A. There was.

Q. Did the price go up or down? A. Down.

Q. On the 20th of March, what was the market price of chums? A. Approximately 55 cents.

Mr. BOGLE.—I want my objection to run to all this as incompetent and immaterial.

Mr. HANFORD.—It will be so considered.

(Testimony of R. E. Small.)

A. \$2.20 per case.

Q. Total valuation of the 10,498 cases?

A. \$23,095.60.

Q. Now, 14,373 cases of pinks?

A. No change; 65 cents a dozen or \$2.60 a case.
Value \$37,369.80.

Q. Now, the medium reds?

A. Ninety cents a dozen; \$3.00 per case. Value,
\$17,229.60. Do you want to know the total value?

Q. Yes, you might state it.

A. That total amounts to \$77,695. I did not give
the total in the first instance, that was \$85,630.40.

Q. And the difference? A. \$7,935.40.

Mr. BOGLE.—I want to renew my objection to all
this testimony on the ground that there is no allegation
in the libel [115] that there was any loss or
market or loss of market price by reason of any damage
and by reason of delay caused by the reconditioning.

Q. Were these salmon that you have referred to,
after being reconditioned, in a marketable condition,
so as to bring the market price?

A. Yes, sir; to the best of my knowledge and belief.

Q. Did the firm of Kelley-Clark company have the
marketing of their canned salmon of that same season's
pack, that came subsequently to this consignment on the
"Jeanie"?

A. Did we represent other people?

Q. Did you handle their goods that came from the
same canneries afterwards?

(Testimony of R. E. Small.)

A. Afterwards, yes, sir.

Q. Do you know just when?

A. Well, all through the season; I should say, safely, all through the marketing season; all through the year, you might say.

Q. Well, you have knowledge that they came from these canneries subsequently to the consignment that came on the "Jeanie"?

A. Yes, sir; I have such a record of them.

Q. What was their condition as to being marketable on their arrival here?

Mr. BOGLE.—I object as incompetent and immaterial and no bearing on the condition of this salmon.

A. Absolutely, they were on good marketable condition.

Mr. BOGLE.—I further object, unless the witness knows from what cannery shipped and grade of salmon and inspected on arrival. In other words, that he is testifying from his [116] own knowledge.

Cross-examination.

Q. (Mr. BOGLE) Mr. Small, what is your official position with Kelley-Clark company?

A. Manager of the salmon end of the business.

Q. Do you have personal charge of the sale of all salmon? A. I do.

Q. What was the opening market price of chums for the pack of 1912? A. 62½ cents.

Q. That was the opening market price?

A. Yes, sir; that was the opening market price.

Q. How is the opening market price arrived at, Mr. Small?

(Testimony of R. E. Small.)

A. Why, it is generally arrived at in this way: We are all of us governed more or less by the price making of the largest concern in the business, the Alaska Packers Association, and we have to listen to what they decide, and they usually wait until the result of the pack is determined pretty thoroughly all along the line. And then the market conditions are well considered. They are always ready to listen to anybody having an opinion, but they finally make the prices, and we simply have to guarantee against them. That is about the condition of affairs, as far as market making is concerned; but sometimes there is a variation in ideas.

Q. That opening market price is an arbitrary figure? A. It is a fixed custom, is all.

Q. And are the brokers and other packers notified by the Alaska Packers Association of the opening market price? [117]

A. Well, they publish it and we obtain it almost simultaneously. Sometimes it is sent out a day or so before we know it, but not often.

Q. Have you a record showing the market price as set for the 1912 pack?

A. Have I any record showing it?

Q. Have you any record showing it, in your office?

A. Well, yes, we issue immediately a circular in connection with it, if that is what you mean.

Q. Yes. A. Yes, sir.

Q. Have you that circular with you?

A. No, sir; I have not.

Q. That circular is issued under your name, is it?

(Testimony of R. E. Small.)

A. Yes, they are our prices.

Q. That is the prices that you endeavor to obtain for the pack of the season of 1912? A. Yes, sir.

Q. Did you refer to that circular lately, Mr. Small, so that you are sure of the price on chums?

A. I did not refer to it at all, Mr. Bogle.

Q. Just merely from recollection?

A. From recollection.

Q. When is that price fixed, what season of the year?

A. Right after the packing season is over, or nearly completed, say the latter part of August.

Q. And when is the large portion of the pack moved from Alaska, Mr. Small?

A. During the fall following.

Q. And which are the busiest months for moving the pack? [118]

A. September, October, November and December.

Q. And after December, is it or is it not, as a rule, more difficult to move a pack at the opening market price?

A. More difficult? Of course that is subject to qualifications, Mr. Bogle. There might be certain conditions where that statement would be absolutely incorrect.

Q. Well, as a general rule, Mr. Small, is it not a fact that the months of January, February and March are the dull months for moving salmon?

A. Yes, you are perfectly correct in that statement, generally speaking.

Q. And that the best market for salmon is during

(Testimony of R. E. Small.)

the fall and winter months, up until along the first or middle of December? A. Yes, that is correct.

Q. How did the prices of 1912 compare with the previous year, Mr. Small? A. Very much lower.

Q. What was the reason for that?

A. Owing to the fact that there were rather abnormal conditions in 1911. We had a combination of circumstances in 1911 that will probably scarcely ever be repeated. That is an almost bare market, and the buyers almost fixing the valuations themselves and fixing them very high. Naturally the spot market had crept up to such a point that it was fixed at a very high market, and it was a very high market when the whole pack was thrown on and it proved to be very disastrous all around. And consequently there was a great revulsion of feeling in 1912, and we had to make prices commensurate with the conditions as we found [119] them. In other words, we had to put them on a basis that would popularize the article.

Q. Was there any portion of the 1911 pack carried over, Mr. Small, any portion that you handled?

A. Scarcely any in first hands, Mr. Bogle. It is impossible to fix the amounts carried over in jobbers' hands, except by mere guesswork.

Q. As far as you are concerned?

A. As far as we were concerned we were comparatively closely sold out.

Q. The 1911— A. The 1911 pack.

Q. Had you sold any salmon for the Alaska Pacific Fisheries, any proportion of their 1912 pack, prior to

(Testimony of R. E. Small.)

this shipment on the "Jeanie"?

A. Yes, certainly.

Q. When did you sell the first of it, Mr. Small?

A. Well, that would be impossible to tell you without consulting my records. But if you know the custom of the business we can sell salmon very early in the year, subject to the approval of prices, or at the opening price, those two methods of selling. Now, I could not tell you when the sales were made. The Alaska Pacific received their proportion of the sales.

Q. Mr. Small you handle, as you have stated, a very large number of cases during a season?

A. Yes, sir.

Q. Do you, in your office, handle these cases separately, or do you handle each account separately, or are these accounts lumped in a way. In other words, if you have, say, [120] 15,000 of one grade of salmon for the Alaska Pacific and you have 85,000 cases of the same grade for other customers, now, in disposing of that salmon would you select outright any one lot, or would you sell in the proportion of that grade and apportion it among your customers?

A. Among our clients.

Q. Among your clients?

A. We aim, as far as possible, to keep a *pro rata* arrangement right through. But the element crops in from the fact that some of the packers have brands that are fairly well known and demand for their brands have to be respected from the general *pro rata* arrangement, if that will answer your question. At

(Testimony of R. E. Small.)

times we get specific orders for certain brands, either the Alaska Pacific or one of our other clients, and that has to be respected and that don't go into the general prorated distribution.

Q. When salmon is sent down from Alaska lacquered and labeled and ready for the market, the only way you can sell that then is on demand for that particular grade or brand, is it not?

A. We have a great many orders in which the arbitrary right of selection rests with us.

Q. Is it not customary, Mr. Small, to dispose of as much of your pack as possible in the fall and early winter months, as you say, subject to future delivery, subject to approval on arrival, subject to examination upon arrival?

A. We aim to as a rule, unless the market tendencies are upward, we endeavor as fast as possible to dispose of as much of the pack as possible during the fall of the year.

Q. You dispose of as much as the market will stand? [121]

A. Yes, sir.

Q. And then the fall and winter of 1912 and spring of 1913, what was the condition of the market? Did it have an upward tendency?

A. Dating from what time to what time?

Q. Well, from the time the opening market price was set in the latter part of August, up to January or February?

A. It was fairly firm; the market was fairly firm until after the first of the year. And then after the

(Testimony of R. E. Small.)

first of the year, drifting right down through the spring, it had a lower tendency in some of the commodities.

Q. How much salmon, of the grade known as chums, did you dispose of during the month of January, 1913?

A. I can hardly answer that question, but I should venture to say very little.

Q. How many of the grade of salmon known as pinks did you dispose of during January?

A. Very few.

Q. And of the medium reds? A. Very few.

Q. How about the month of February, 1913?

A. Business was also light.

Q. I suppose very few consignments of any of these grades? A. Yes, sir.

Q. And March?

A. A little more increase of business, as the market went down and met the ideas of the jobbers, as spring progressed, the business increased.

Q. Did you dispose of any salmon for the Alaska Pacific Fisheries during the month of January, 1913? [122] A. I cannot answer that.

Q. I wish you would find that out, Mr. Small. You can, by an examination of your books, can you not? A. Oh, yes.

Q. Could you answer the question as to whether or not you disposed of any salmon for that company in February? A. I did not ascertain that.

Q. Or in the month of March?

A. I did not ascertain any specific figure at all.

(Testimony of R. E. Small.)

Q. I wish to obtain that information, Mr. Small, When did you dispose of a large portion of the pack of the Alaska Pacific Fisheries, the 1912 pack?

A. They were disposed of all through the season of 1913, the year 1913, up to the new pack of 1913. Disposed of a great deal during the spring and summer.

Q. Do you know how many cases you had on hand, or subject to your orders, belonging to the Alaska Pacific Fisheries on March 21, 1913?

A. No, sir; I do not know.

Q. Is it customary for the Alaska Pacific Fisheries to notify you when their pack is put up, the number of cases they have on hand for sale?

A. After the pack is completed?

Q. Yes, sir. A. Certainly.

Q. And then you dispose of them as rapidly as possible, taking into consideration the market and the prices to be obtained? A. Yes, sir.

Q. Could you tell me whether or not you disposed of any of [123] their pack prior to January 8th, 1913? A. I did.

Q. Could you tell how many cases you disposed of?

A. I cannot know without consulting my books.

Q. I wish you would also obtain that information for me, Mr. Small. You had nothing to do with reconditioning or overhauling this "Jeanie" shipment, did you? A. No, sir; not a thing.

Q. Had you sold that shipment prior to the arrival of the "Jeanie"? A. No, sir.

(Testimony of R. E. Small.)

Q. When did you succeed in selling that consignment?

A. I cannot answer that without consulting my notes.

Q. I wish you would consult your books on that point. When did you call upon the Alasoka Pacific Fisheries for a delivery of this "Jeanie" consignment?

A. I do not think I made any definite call beyond expressing an opinion that a certain amount better be shipped down. That is all that would be customary. I do not think I made any specifications at all for a definite cargo.

Q. Do you remember now, what this shipment sold for, the price it sold for?

A. No. That would be impossible to tell without consulting each individual sale, and the market in the spring was more or less erratic.

Q. Is it not customary, Mr. Small, to give a discount in sales of salmon during the dull season?

A. It is not customary for us to do so.

Q. Did you discount any sales of salmon on this grade during the early part of 1913? [124]

A. You refer to interest discounts, favored customers, is that your question?

Q. No. It is usual, is it not, to sell salmon one and a half off for cash?

A. That is simply part of the price; that it never even mentioned.

Q. It is the customary price? A. Yes.

Q. Then there is another five per cent which goes

(Testimony of R. E. Small.)

to the broker? A. Yes, sir.

Q. Now, outside of the discount of five per cent and the one and a half per cent, is it customary, in order to dispose of a pack, or portion of a pack, during the dull season, to further discount from the market price, the opening market price?

A. Our custom is to make a price; we do not give any inside discount at all. We sometimes may make a price, that is what we consider consistent with the market conditions.

Q. Well, that price is not necessarily the opening price? A. Oh no, no.

Q. That is what I am getting at. After you make your price then it is customary for you to discount the opening market price during the dull period if you want to move the salmon?

A. That might prevail during a dull period, say in an extreme condition like existed in the spring of 1913; we have scarcely had such a down market for many years.

Q. Over what period did that down market extend?

A. Practically extended from January steadily right down to [125] midsummer.

Q. Was there any variation in the price from January until the middle of March?

A. Yes, decided drop in all of the grades—in two of the grades mentioned in this controversy.

Q. What grades?

A. Chums and medium reds.

Q. There was a decline of how much in the price of

(Testimony of R. E. Small.)

chums from January 8th to March 21st?

A. Seven and a half cents a dozen, thirty cents a case.

Q. And when did that decline take place?

A. Well, the first evidence of it that I noticed in my records, was in February, 57½ and then dropped to 55.

Q. About what time in February?

A. Oh say the 10th or 15th.

Q. Did you have a sale or was there any market for this salmon at the time it arrived January 8th, 1913, at the opening market price?

A. Very little business at that time.

Q. Could you have disposed of this pack, consistently with the custom of your office handling all of your customers at that time?

A. You mean this entire block?

Q. Yes, sir.

A. No, sir. I could not.

Q. As I understand it then, Mr. Small, while the opening market price obtained up until some time the first of February, at the same time it was a very dull market and very little moving. [126]

A. It is the customary condition of affairs at that time of year.

Q. It was very much so during the early months of 1913, is that true?

A. Well, I would not say that it was any more than the usual state of affairs.

Q. Did not the Alaska Pacific *Fishers* ship any more salmon down from Alaska prior to the 15th of

(Testimony of R. E. Small.)

February? A. You mean the January shipment?

Q. From their canneries, did they subsequently ship any salmon?

A. Subsequent or prior to this "Jeanie" shipment?

Q. Subsequent to this "Jeanie" shipment.

A. Yes, they shipped salmon subsequent to the "Jeanie" shipment.

Q. What time?

A. My recollection is all through the spring we had shipments.

Q. Did you have any along in the middle of January?

A. No, I think that was the only shipment in January that we had, if my recollection serves me correctly.

Q. Look up your records on that.

A. I have my records on that; I failed to bring them along with me.

Q. At the time of the arrival of this "Jeanie" shipment, did the Alaska Pacific have any salmon here on hand ready for shipment?

A. That I could not answer offhand; I did not ascertain that.

Q. Could you tell from your records?

A. Oh, yes, I could tell from my records.

Q. Look up your record on that, too. Is it customary, Mr. [127] Small, to sell salmon for immediate delivery? Is it not the custom in most shipments to sell for future deliver?

A. Well, if you mean to fix the percentage, the per-

(Testimony of R. E. Small.)

centage of any one pack that is sold for spot shipment as it were, as distinguished from the future sales as we term it, I should venture to say that would be pretty hard to deal with, except in a specific year, because we sell a great deal of salmon for spot shipment, that is for immediate shipment.

Q. Is it not a fact that most of the sales are for future delivery?

A. Most of our sales, the bulk of our sales are sold prior to packing, or at the time of the pack, for shipment during the fall season, that is the bulk of the business.

Q. I understand, however, that you had not sold this particular consignment at the time of the arrival?

A. I cannot tell now, and possibly I could not even tell from our records whether I was dependent upon some of these for sales that were on the books ready for shipment. I do not know that I could even tell that, unless I could remember the instances surrounding it. It might have been that I was dependent upon this thing and when it came in I was prevented from using it.

Q. There is a decided advantage—

A. —Rarely have complete shipments in December for the fall. I will say to you that oftentimes January appears like a very good month with us, because we are unable to get all our shipments off during the fall of the year.

Q. But these are shipments previously sold and for future delivery? [128] A. Yes.

(Testimony of R. E. Small.)

Q. In case of sales for future delivery, the packer has to carry the pack?

A. That is until the time of shipment.

Q. That amounts to some two or three per cent per month for carrying the pack? A. Yes, sir.

Q. Mr. Small, did you make any request of the Alaska Pacific Fisheries to deliver this "Jeanie" shipment to you at any time during the month of January, February, up to the middle of March? Tell them that you had a sale for it and desired to ship it?

A. Just drawing on my recollection, Mr. Boble—

Q. Not as a matter of record in your office?

A. Even if I had my records I would have to draw on my recollection any way, and my recollection was that I could have used some of this salmon and I needed it. That is merely my recollection. I cannot tell whether I am truthful in making that statement or not. I would have to refresh my memory by consulting the stocks at that time and the sales that had not been filled, and then it would be a question of judgment.

Q. You could not tell, and you do not recollect now, whether or not you could have handled any portion of this shipment in January, February or up to the middle of March, or what proportion of it you could have handled?

A. I could not tell accurately that, no, or truthfully without studying my records.

Q. Could you tell now, Mr. Small, whether or not you could [129] have handled any of it. Do you

(Testimony of R. E. Small.)

state that you could have handled any of it?

A. I would not undertake to answer that without studying the condition of affairs.

Q. In giving the figures as to the price of this grade of salmon in the month of March, 1913, I take it that you are using your records of the average price which obtained for this grade of salmon at that time?

A. Yes, I was governed by the actual condition.

Q. Not from the price which you obtained for this salmon?

A. I was governed by actual sales that I found on my books at that time.

A. Not of this particular salmon?

A. Not of this particular salmon.

Q. I think I asked you whether you remembered when this salmon was sold?

A. I cannot tell you that.

Q. Whether sold for immediate or future delivery?

A. You mean whether I had orders awaiting the arrival of that salmon, is that what you mean?

Q. Not in this particular question. I want to get the specific fact as to when you sold this salmon, and also want to know whether you subsequently sold it. A. Yes.

Q. For immediate or future delivery?

A. Well, if we sold it after that time the chances are there was no sale of it for future delivery at all; it was a question of spot shipment.

Q. After what?

A. Any time after the first of January we are not

(Testimony of R. E. Small.)

selling— [130] we might possibly extend the future delivery thirty days or something of that sort. An order might come in for shipment next month, but we would not take any business there for shipment say 60 or 90 days or 120 days ahead. I do not remember that we did any such thing as that; it is not customary, after the pack is closed the market resolves itself pretty closely into immediate shipment.

Q. Do you know, Mr. Small, whether or not any of this pack was left over and carried over until the next season? A. Into the 1913 pack?

Q. Yes.

A. I could not answer that question definitely.

Q. Could you obtain that information from your books?

A. Yes, I could obtain that information from our books.

Mr. BOGLE.—I would like to get this definite information, Mr. Small, about this particular pack. We can go ahead with Mr. Burckhardt while Mr. Small is getting it.

Mr. HANFORD.—I will object to the testimony on the ground that it is not proper cross-examination as being germain to the inquiries that were made in the examination in chief, and if you want it you can have Mr. Small for your witness.

Mr. BOGLE.—You opened the line of inquiry as to the market price. I do not think it is material.

Mr. HANFORD.—Our position, Mr. Bogle, will be that the measure of damages is to be ascertained by

(Testimony of R. E. Small.)

reference to the market fluctuations; the actual sales or loss of profits by not making sales we are not claiming here. The general measure of damages, the depreciation in [131] value during the period of detention, that is what we will contend for.

Mr BOGLE.—I do not think you have made such an allegation. You allege that you lost interest during the time it was being reconditioned, not that you lost the market or that the market price dropped. And having gone into that, I think it is material to see whether or not the market price dropped any, or dropped so as to affect this particular shipment. The general fact that the market price dropped, without any information here or testimony that this libelant suffered by that drop in the market price, would not be material. Specific damages are claimed, and I think it is material to have Mr. Small get this for me.

Mr. HANFORD.—Mr. Small, you can ascertain as near as you can, the information Mr. Bogle wants, and if he wants to examine you about it he can do so. He has a right to do so over our objection. I simply want my objection noted that it is objected to as not being cross-examination.

(Witness excused.) [132]

[Testimony of Charles A. Burckhardt, for Libelant.]

CHARLES A. BURCKHARDT, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HANFORD.) State your full name?

A. Charles A. Burckhardt.

(Testimony of Charles A. Burckhardt.)

Q. What is your relationship to the Alaska Pacific Fisheries? A. President and manager.

Q. Were you occupying that position during the packing season of 1912? A. Yes, sir.

Q. What part did you personally have in the packing of the product for 1912?

A. The Yes Bay pack.

Q. Were you there personally? A. Yes, sir.

Q. Were there salmon that came on the "Jeanie" from that season's pack at Yes Bay? A. Yes, sir.

Q. State what the condition of the goods were as being completely prepared for market and in what condition, at the cannery?

A. They were in first-class condition in every respect, both as to contents and package.

Q. Give us a description, in a general way, of that cannery. How it is situated with reference to access by vessels coming and bringing fish there and taking the product away?

A. Yes Bay is located about 40 miles northeast of Ketchikan, at the head of Bean canal. We have a good wharf and good warehouse facilities; the salmon was all under [133] cover, protected from all kinds of weather.

Q. How about its being clean or subject to soiling the cases by dirt or coal-dust or anything of that kind?

A. No dirt, it was impossible for anything of that kind to happen.

Q. In moving the goods from the warehouse to be

(Testimony of Charles A. Burekhardt.)

loaded in a ship, what distance would they have to be moved?

A. The width of the dock is about thirty feet and the trucking from the warehouse to the slings and on to the vessel would be that distance.

Q. What is the extent of the salmon-packing business carried on by the Alaska Pacific Fisheries, what canneries do they have and where are they situated?

A. We have three canneries. One located at Yes Bay; one located at Chomly Sound, Prince of Wales Island, and one at Chilkoot inlet, near Haines.

Q. What is the fact as to all of the salmon that came on the "Jeanie" being of the pack of 1912, or any leftovers from previous years?

A. It was all 1912 pack.

Q. Do you know how many cases altogether came on the "Jeanie" of the different kinds?

A. 29,657 cases.

Q. Were you in Seattle when the "Jeanie" arrived? A. I arrived the following morning.

Q. You were here the day after she arrived?

A. Yes, sir. Just one moment, I think she arrived during the night, or late that afternoon and I was here the next morning.

Q. Were you here during the time the goods were being [134] discharged from the ship?

A. Yes.

Q. State, if you know, whether the freight for the carriage of the goods on the "Jeanie" was paid.

A. Yes, sir.

Q. Did you see the goods after they were dis-

(Testimony of Charles A. Burckhardt.)

charged, or as they were being discharged?

A. I saw them while they were being discharged and after they were discharged.

Q. What did you observe in regard to the condition of the goods?

A. I went down to the dock while the "Jeanie" was discharging, with Mr. Roberts.

Q. Now, before speaking of the salmon cases, state what, if anything, you observed about the appearance of the ship and the condition of the decks.

A. The ship was very dirty. There was coal scattered over the ship. The hatches of the ship were both open. They were not working the ship at the time; it was pouring down rain. The aft hatch sling had broken and there was a whole sling of salmon cans scattered all over the aft hold. The forward hatch cases were black with coal-dust, and men had been tramping down around them and tracked it all over the whole place. The tarpaulins were lying off to one side. I went and examined the tarpaulins and they were absolutely rotten. Also, the cases were standing out, piled up on the edge of the dock without any cover.

Mr. BOGLE.—I object to the testimony and ask that it be stricken, as there is no allegation in the libel that [135] the cargo was damaged by reason of the method in which it was unloaded in Seattle. The allegation of damages is that it all occurred on the voyage from Alaska to Seattle.

Mr. HANFORD.—We are not claiming any special damage by rain during the discharging opera-

(Testimony of Charles A. Burekhardt.)

tion, but it is part of the *res gestae*. We have got to show what Mr. Burekhardt observed there at that time.

Q. Go on and state the appearance of the cases; all that you observed during the time of discharging and reconditioning the goods, as to the condition of the cases, cans, and labels, all about it.

A. The salmon came out of the ship and they were transferring it over to the brick warehouse with an elevator, and the ship people had a man there, and we also sent a man up there to try to pull out the wet and dirty cases and we pulled out a great many of them; some of them got by and went over. And the cases, I forget how many thousand cases, were on the dock, the worst of them were standing on the dock, sides out, mashed up cans, mashed up and dirty labels, labels covered and cans covered with coal-dust and some with rust. I went over and examined the cases at the warehouse. Some of the cases that were apparently clean and were entirely clean on the outside, on opening them up we found them filled with coal-dust.

Q. (Mr. BOGLE.) You observed this all yourself, did you, Mr. Burekhardt?

A. Yes. And you could not tell from the outward appearance of the package as to the contents on the inside, on [136] account of this coal-dust that had scattered through there and soiled the labels and dirtied the cans and dirtied the insides of the boxes.

Q. (Mr. HANFORD.) State what, if anything,

(Testimony of Charles A. Burckhardt.)

occured with reference to action to remedy this damage?

A. After this cargo had been discharged my brother and I went up to the dock and we met this gentleman, Mr. West, there that morning, and he told me he was representing the insurance people, and Mr. Hall, the manager of the dock, and a Mr. Dawson, representing the ship, and Mr. Horner was there. We looked these cases over at that time on the dock, and they were in very bad shape, and I told them that they would have to get action on them pretty quick or the rust would cause more damage. And Mr. West asked me if I was satisfied with Mr. Horner to overhaul that cargo, and I told him that all we wanted was that they put the cargo in as good condition as they received it, and Mr. Horner, as Mr. Horner was going to do the work, he would be acceptable to us, and we left then, thinking the matter had been entirely adjusted, that the insurance people were going to recondition this cargo and put it in the same condition as they received it at the cannery.

Mr. BOGLE.—I object, let the witness state what happened.

Mr. HANFORD.—That is what he is stating.

Mr. BOGLE.—He is stating conclusions. Let him state what took place between the different parties.

Mr. HANFORD.—That is what we want.

Q. Now, following the history of the matter, state what [137] was done to recondition and overhaul

(Testimony of Charles A. Burckhardt.)
and inspect the salmon?

A. The salmon was reconditioned by Mr. Horner. I went up there quite often to see how the work was progressing, and after it was all finished, or before it was finished, he asked us for a little advance on the thing, he said he was getting in the hole on the thing and would not get his money from the insurance company until he finished the cargo and he wanted some money—

Mr. BOGLE.—I object as incompetent, immaterial and hearsay.

Mr. HANFORD.—It is not material as to your conversation with Mr. Horner.

A. (Continuing.) Finally, Mr. Horner had completed his work and came to me and stated that the insurance people would not pay the bill—

Mr. BOGLE.—I object to any conversation between the witness and Mr. Horner, as not material in this case and it is hearsay.

A. (Continuing.) Mr. Foreman of the insurance company came up at that time in my office and refused to pay the bill, and we had to pay the bill.

Q. Did you pay it? A. Yes, sir.

Q. How much, the amount shown on the bill?

A. Yes, the full amount.

Q. Before the work was done, in the condition in which the cargo was discharged, could that have been marketed? A. No, sir.

Q. Is there any reason that satisfied you as a business man, why it was necessary to do all the work that [138] Mr. Horner has charged for, including

(Testimony of Charles A. Burckhardt.)

the handling of all the cans in all the cases?

A. It could not have been done any other way.

Q. That was absolutely necessary to put it in condition?

A. If we had shipped that salmon out to any customer and he had received the salmon with the dirty labels and dirty cans from this coal-dust, we would have had rejections on our goods, and had the goods scattered all over the country.

Q. At any time did you have any conversation with anyone except Mr. Dawson representing the ship, in regard to this matter?

A. With Mr. Swan.

Q. Who is Mr. Swan?

A. Mr. Swan was the manager of this company.

Q. Can you fix any time that you had any conference with him about the business?

A. It was during the time that this work was in progress.

Q. How soon after the arrival of the ship?

A. I think immediately.

Q. Was the matter mentioned or talked of between you and Swan in any way as to the extent of the damage or the nature of the damage or the cause of it?

A. Yes, Mr. Swan—I told Mr. Swan that the entire cargo would have to be overhauled.

Q. Have you in your possession or under your control any of the bills of lading or copies of them, that were issued for this shipment?

A. They were delivered to the warehouse people

(Testimony of Charles A. Burckhardt.)

as soon as the goods arrived. [139]

Q. If this salmon had arrived in an undamaged condition, what would have been the market value here in Seattle the date of arrival, or say January 8 or 10 or 11?

Mr. BOGLE.—I object unless the witness can show that they had a sale for it, otherwise the market price is not material, as there is no claim for the market price of the salmon, merely for damage to the salmon and cost of reconditioning and deterioration of the goods.

Mr. HANFORD.—I have to prove this in order to show we are damaged by delay.

Q. The gross amount?

Mr. BOGLE.—I object. The only allegation you make is damage by delay, is loss of interest during the period you were delayed in marketing the salmon.

Mr. HANFORD.—I want to show the computation of interest, show how much it amounts to.

A. \$85,630.40.

Q. (Mr. BOGLE.) What are you reading from?

A. A statement that I prepared.

Mr. BOGLE.—I object unless he can show he has some knowledge of the market value of these salmon and what he is basing it on.

Q. (Mr. HANFORD.) Were you keeping track and observing the price of salmon during that time? A. Yes, sir.

Q. Have you made a computation of the interest on that valuation up to the 20th of March?

(Testimony of Charles A. Burckhardt.)

A. \$985.60.

Q. At what rate did you make that computation?

A. At six per cent. [140]

Q. What, if any, change, any depreciation or market value occurred between the 8th of January and the 20th of March?

Mr. BOGLE.—I object as immaterial.

A. The market price of the salmon on March 20th was \$77,695.00.

Q. (Mr. BOGLE.) You are still reading from that statement?

A. Yes, a difference of \$7,935.40.

Q. (Mr. HANFORD.) State what you know about the condition of the market during January and February and March, as to it being active or dull or what it was?

A. We moved quite a good deal of salmon during January and February and March, but I haven't any figures with me to say just exactly the amount that we did move.

Q. Do you recollect any particular sales that were made shipment to Manila or elsewhere?

A. Yes, we made some shipments to Manila—some large shipments, but I do not recollect exactly the number of cases at this time.

Q. Well, during what periods or what months did that occur? A. During January and February.

Q. That did not include any of these goods?

A. No, sir.

Q. What was the condition of other shipments that were made from your canneries in Alaska of

(Testimony of Charles A. Burkhardt.)

the 1912 pack before and after the goods that came on the "Jeanie," as to their being damaged or undamaged.

Mr. BOGLE.—I object as incompetent and immaterial.

Mr. HANFORD.—We claim that it is material to show that the goods coming out of these canneries were in good condition except those that came on the "Jeanie." [141]

A. We had no trouble except this one shipment.

Q. Has this salmon that came on the "Jeanie" been disposed of, all of it? A. Yes, sir.

Q. What is the fact as to canned salmon, packed in cases as this was, being subject to deterioration from any inherent defect during water transportation? A. I do not get that question.

Q. Well, some goods carried in the hold of a ship will be damaged by sweating, and tin cans may rust under conditions of that kind. I want to know, when canned salmon are put up as these were, what could have caused the damage that was found in them, as being anything to which the goods themselves were subject by inherent conditions?

A. There could not anything any damage occur to these packages excepting through the water getting on to the cans, and this coal-dust and dirt getting into them. We ship our cans around the Horn by water—

Mr. BOGLE.—I object as immaterial.

Q. Continue about the fact as to their being capable of being transported on long voyages.

(Testimony of Charles A. Burckhardt.)

A. We ship thousands of cases all over the globe, Africa, South America, Manila, Singapore, around the Horn to the Atlantic coast, and we never had any trouble, never had a claim on that account.

Q. (Mr. BOGLE.) On what account?

A. Damaged goods.

Q. (Mr. HANFORD.) Besides Mr. Horner's bill for reconditioning, were there any other expenses incidental [142] to the reconditioning of the goods?

Mr. BOGLE.—I object, there is no allegations in the libel as to any other damage or any other bills.

A. Yes, sir.

Q. State what they were.

A. The storage for the above period, from January 10th to March 20th, amounting to \$778.47, that is at the rate of 25 cents for 2,000 pounds. The cases are 70 pounds and made a total of 2,075,990 pounds.

Q. Was there any other item of expense?

A. Insurance.

Mr. BOGLE.—I object to that, there is no allegation covering any further damage.

A. For the same period at \$.93 per hundred per annum, amounting to \$150.54.

Q. Is there any other fact that you think of that you want to state in this connection?

A. I do not think so.

Cross-examination.

Q. (Mr. BOGLE.) Mr. Burckhardt, you say that all the "Jeanie" salmon has been disposed of?

A. Yes, sir.

(Testimony of Charles A. Burckhardt.)

Q. Do you know when the last of that salmon was disposed of? A. No, I do not.

Q. Could you give us the approximate date?

A. No, I could not.

Q. Was it disposed of during the year 1913?

A. Yes, sir. [143]

Q. Was it disposed of prior to July, 1913?

A. I could not say. I think it was. I could not be positive. It was all sold about that time, but I could not say as to delivery, whether it all moved out or not.

Q. Was it all moved before September, 1913?

A. Well, I would think so. I could not answer that positive unless I went through my records. We do not keep any special records of our shipments. I would have to get that from Kelley-Clark.

Q. You have received returns from all of the salmon, have you?

A. Yes, we got our returns as to the year's pack, not as to cargo.

Q. Have you had any claims against the salmon? Was it all in good condition when delivered?

A. Well, we had no unusual claims, no more than we generally get; some small swelled claims, runs about the same as on any packs.

Q. Was it all in salable and marketable condition after it was overhauled by Horner, after he finished with it? A. We were satisfied it was.

Q. Then Mr. Burckhardt, the allegation of the libel that by reason of irremediable damage thereto by reason of dust on the cans of two thousand cases,

(Testimony of Charles A. Burekhardt.)

the libelant has been unable to sell and dispose of the same, whereby libelant sustained a loss of \$4,500 is incorrect—the 12th allegation of the libel?

A. How many cases?

Q. Two thousand cases which were in an unsalable condition and you have been unable to sell or dispose of [144] the salmon and sustained a loss thereby of \$4,500, is that or is it not a correct statement? A. I think it is a correct statement.

Q. You just stated that you sold it all?

A. Yes.

Q. Did you sustain a loss of \$4,500? A. No.

Q. It is not correct then. Has this salmon depreciated any after being overhauled and reconditioned? A. No, sir.

Q. The tenth allegation of the libel states that the said merchandise after being so overhauled and reconditioned depreciated in value \$2500, that is not correct? A. No, sir.

Q. Do you know when this particular salmon was marketed, Mr. Burekhardt?

A. It was marketed during the spring and summer of 1913. I cannot give you the exact dates.

Q. Mr. John A. Burchardt is your brother, is he?

A. No; he is vice-president of the company.

Q. He is your brother?

A. No, my name is Burekhardt and his name is Burgard.

Q. He is vice-president of the company?

A. He was at that time.

Q. Mr. Burekhardt, you were aboard the "Jeanie"

(Testimony of Charles A. Burckhardt.)

on the morning after she arrived?

A. Yes, the morning they were discharging.

Q. They were discharging when you arrived at the ship? A. No, they were not.

Q. Had they discharged any cargo up to that time?
[145] A. They had discharged some cargo.

Q. From what hatches had they discharged cargo?

A. They were discharging from both hatches, the forward hatch and the middle hatch.

Q. That is the main hatch forward, hatch amidships?

A. No, the aft hatch, the hatch amidships and the aft hatch.

Q. Did you examine the cargo in the hold at that time, the hatches were open, were they not?

A. Yes, sir.

Q. What was the condition of the cargo in the forward hatch?

A. I did not go to the forward hatch.

Q. The main hatch forward?

A. The main hatch cases were all dirty.

Q. You did go to that hatch?

A. Yes, that is the big hatch.

Q. You inspected the cargo as it lay in the hold of the ship? A. Yes, sir.

Q. How much had been taken out at that time?

A. Oh, that would be pretty hard to say.

Q. Oh, just roughly, any appreciable amount or just a few hundred cases?

A. Several thousand cases, I would say.

Q. Had been taken out at that time?

(Testimony of Charles A. Burckhardt.)

A. Yes, sir.

Q. And these cases were in what condition, were they wet? A. Dirty and wet.

Q. Were they all wet? [146]

A. No, not all of them.

Q. Well, were all the damaged cases from that hatch in a wet condition? A. No.

Q. What was the cause of the damage, apparent cause of the damage to the other cases?

A. As I looked down that hatch, the cases that were along the sides of the ship were the dirtiest ones, excepting those that were immediately under the hatch.

Q. Those along the sides, next to the skin of the ship? A. Yes, sir.

Q. Were they wet also?

A. Yes, wet and dirty; they were very wet.

Q. All of these salmon were in the between decks or deck immediately underneath the hatch. You did not inspect any salmon that was in the hold of the ship?

A. Well, they had taken some salmon out of the aft hatch I could not say how much; they had broken a hole into it there and it was wet.

Q. It was also wet, was it?

A. It was wet but it was not dirty like the other salmon in the forward part of the vessel; there had been a sling load of salmon broken and scattered all over the after hatch.

Q. What I want to get at, is the nature of the damage; was all the damage to the cargo in the after

(Testimony of Charles A. Burckhardt.)

hatch water damage?

A. Well, I could not say as to that.

Q. Did it appear to be dirty?

A. It was dirty, but not near as dirty as the other part. [147]

Q. Did you see evidence of coal-dust damage there?

A. Well, it was black and dirty; I could not say whether it was coal-dust or not.

Q. Could you say whether or not it was coal-dust damage forward? A. Yes, sir.

Q. That you could tell from the forward hatch.

A. They were down deeper in the other hold, in the aft hatch.

Q. From the cases that you could see in the after hatch, could you tell whether there was coal-dust damage or not?

A. I would say yes, I thought there was some coal-dust even in there, but it did not appear to be as wet a condition as the other part of the cargo.

Q. Now, was this cargo in the after hatch, was all the damage immediately under the hatch or any damage near the skin of the ship?

A. I could not say as to that. The after hatch is very small. It is a very small hatch there.

Q. Now, that was the extent of the examination you made the first day you went down there?

A. Well, I examined the tarpaulins the first thing.

Q. How did you happen to do that?

A. We were advised that the tarpaulins were rotten, in bad shape.

(Testimony of Charles A. Burckhardt.)

Q. You had been advised that? A. Yes, sir.

Q. Prior to this first visit? A. Yes, sir.

Q. What tarpaulins did you examine and where were they? [148]

A. They were lying right alongside the hatch.

A. The after hatch?

A. The forward hatch and the after hatch both.

Q. We will take one hatch at a time. How many tarpaulins did you examine alongside the after hatch?

A. Well, there was a bundle lying there, piled right there.

Q. Could you tell how many there were?

A. No.

Q. What was the extent of your examination?

A. I took hold of it and tore it, it was rotten.

Q. That was all you could tell about that, that it was rotten and tore?

A. It was not a proper kind of covering to put over a hatch. It would not keep the water out.

Q. How did you know that it had been over that hatch? Because it was lying there?

A. Yes, sir.

Q. Do you know whether or not there were any other tarpaulins over that hatch? A. No.

Q. The only thing you noticed about the tarpaulins was that they were rotten and were thrown there? A. There were no other tarpaulins there.

Q. You did not see any other? A. No.

Q. Now, did you notice the tarpaulins at the forward hatch? A. Yes, sir.

(Testimony of Charles A. Burckhardt.)

Q. Were they in the same condition?

A. Yes, sir.

Q. How many tarpaulins were there at the forward hatch. [149]

A. I did not examine. I just saw them lying there and took a look at them.

Q. Did you tear one of these?

A. Yes, there was a hole in that forward one and I put my finger in the rip and pulled it right down.

Q. That was the extent of your examination, was it? A. Yes, sir.

Q. How were these hatches constructed, Mr. Burckhardt? A. How are they constructed?

Q. How are they secured and fastened?

A. They had planks across first and then covered with these tarpaulins.

Q. Planks across the face of the hatch?

A. I was not there when they were battered down.

Q. They are the ordinary construction of hatches?

A. Yes, sir.

Q. Did you notice the discharge of that cargo as it came out of the ship at a subsequent date?

A. Yes.

Q. Where did the most of the damaged cargo come from, what hatch or what hold, what deck, rather?

A. I could not say as to that.

Q. Could you tell from what hatch most of the damaged cargo came from?

A. Well, from what I saw, it was that amidship hatch, when I was there.

Q. The main hatch is forward of the pilot house is

(Testimony of Charles A. Burckhardt.)

it not? A. Yes, sir.

Q. You made no further examination of the cargo of the ship after that, did you? [150]

A. No, sir.

Q. Was all of this damage to the salmon caused by the leaking of the water, the water getting into the cases?

A. The main damage was done by the fact that this coal-dust had worked through these cases, and there was no possible way of detecting this thing until you opened up the cases. The wet cases and the dirty cases, you could pile these aside, but the other cases that were dry, the cases that were clean and apparently absolutely clean on the outside, and were filled with this coal-dust, that is what necessitated the overhauling of this entire cargo. If it had not been for this coal-dust, it would not have been necessary to have opened all these cases.

Q. That is not what I ask you, Mr. Burckhardt. I am asking if the water did not cause the major portion of the damage to this cargo.

A. Well, I would think not; I think it was coal-dust.

Q. Well, what damage did the coal-dust cause to the cargo?

A. It necessitated the overhauling of this cargo.

Q. Was that the main damage?

A. The cleaning of these cans and getting the dirt off and making new cases. If the cases had been clean everything clean in the hold of the ship, with clean water on there, it would not have caused any such damage.

(Testimony of Charles A. Burckhardt.)

Q. How about the clean salt water, would not that have caused any damage?

A. Well, it would have caused some damage, yes.

Q. Does not salt water cause the cans, unless you recondition [151] them and wipe them off, does not that cause a certain amount of rust and eat into the cans and cause to spring or open up?

A. There is some danger of that. It in fact eats any tin even if it is lacquered. But we have had the tide come up into our warehouse and had the cans all wet, and simply set them up to dry off, without damage to them.

Mr. BOGLE.—I move to strike the answer as not responsive to the question.

A. You are trying to get me to tell you something—

Q. I am trying to get you to tell the facts, is all. Is it or is it not a fact that salt-water damage to shipments of canned salmon, if allowed to remain without overhauling and reconditioning, will cause the cans to blow, to become blown?

A. It will cause the cans, if enough water gets on the cans, it will cause the cans to rust and eat a hole beneath the rust, will eat a hole through the tin and make it leak.

Q. Will it or will it not cause the cans to be blown?

A. If there is a hole there it cannot puff.

Q. I am not talking about a hole in them, but one witness this morning stated that salt water would cause canned salmon to blow, unless it was wiped off, is that not a fact?

(Testimony of Charles A. Burekhardt.)

A. Water upon tin, salt water gets on there it will cause rust, and rust will eat through the tin, and of course the moment there is a hole in that can it will spoil, become a bad can. If the hole should not close up by fish getting in there or anything else—if it closes [152] up it may possibly puff, but if the hole should stay open it would simply spoil and the contents run out.

Q. Now, salt water will cause considerable damage to canned salmon? A. It will to the tins.

Q. Now, what damage would the coal-dust, provided it did not come in contact with salt water, cause it?

A. What damage would coal-dust itself cause?

Q. Yes.

A. It would cause this damage that the cans would be unsalable.

Q. Now, how would that be remedied?

A. By cleaning it.

Q. And that would remedy the entire damage, coal-dust damage, provided there has been no salt-water damage?

A. It would have to be cleaned, probably the labels taken off and relabeled.

Q. Can you tell what proportion of this damage was caused solely by coal-dust and what proportion was caused by salt water, either becoming mixed with coal-dust or alone, Mr. Burekhardt? A. No, sir.

Q. Is it not a fact that a large proportion of the damage was by reason of salt water, or other water coming in contact with the coal-dust?

(Testimony of Charles A. Burckhardt.)

A. No, sir, I could not state that.

Q. You do not know what that proportion would be?

A. No, sir, because Mr. Horner was employed by these people to overhaul that cargo, and we had confidence enough in him to let him go ahead and do it, and we [153] did not keep any check on him.

Q. At the time of this conference between yourself and Mr. Hall and Mr. Dawson and Mr. West, how much salmon had been unloaded from the ship?

A. I think the entire cargo had been discharged.

Q. How many cases were on the dock?

A. I could not say definitely how many cases, somewhere around four thousand cases I would say, offhand; three or four thousand cases. I have not any distinct recollection of that.

Q. If Horner says 2100 or 2200, would you say that was about correct?

A. I would say so; he is in a position to know.

Q. Did you have a representative at the ship during all the time that this salmon was being unloaded?

A. The greater part of the time.

Q. Who was there representing you?

A. A man by the name of Palmer.

Q. He was there for what purpose?

A. He was there to try to help them pick out the wet cases and keep them from going over into the warehouse.

Q. Now, these wet cases which had been picked out by Mr. Palmer, your representative, and Mr. Hall, the warehouseman, were placed in a pile on the

(Testimony of Charles A. Burekhardt.)

dock? A. Not all of them, no.

Q. Where were they placed?

A. Some were taken into cars and transferred around to the other warehouse.

Q. Some wet cases taken out of the shipment?

A. Yes, sir. [154]

Q. Taken into cars? A. Yes, sir.

Q. At the time of this conference, did any of the parties examine any of the salmon which was in the warehouse? A. No, sir.

Q. Was there anything said about any of the salmon in the warehouse being damaged? A. Yes.

Q. What was said?

A. They said some of the salmon—

Q. Who said that?

A. I think it was Mr. Hall said some of the salmon had been taken on the cars and was to be switched around to the warehouse and pack it over there.

Q. Did he say how many cases? A. No.

Q. Did Mr. Horner notify you when he had finished overhauling the damaged cases which were left on the dock?

A. Mr. Horner came to us when he could not get his money from the insurance company.

Q. When he could not get his money from the insurance company, that is, from Mr. West?

A. Mr. Foreman.

Q. Mr. Foreman represented the insurance company? A. Yes, sir.

Q. They are not parties to this suit. Did Mr. Horner come to you after the 2000 or 2200 cases of

(Testimony of Charles A. Burckhardt.)

salmon on the dock were completed, and state to you in substance that there were some damaged cases in the warehouse? [155]

A. I do not know whether he did or not. I knew that there were. He may have told me that.

Q. Is it not a fact that he called your attention to it? A. No, sir.

Q. Did you ever notify Mr. West or Mr. Dawson, that there were any damaged cases in the warehouse?

A. No, sir.

Q. Did you authorize Mr. Horner to go ahead and recondition or overhaul this entire shipment?

A. No, sir.

Q. He did that himself, on his own initiative?

A. From his orders, I understood, from the insurance people.

Q. You had nothing to do with it? A. No, sir.

Q. At all? A. No, sir.

Q. You afterwards paid the bill?

A. Yes, or he would have libeled our salmon.

Q. He did not libel the salmon?

A. Because we paid the bill.

Q. You paid the bill?

A. Yes, sir. We had a conference in our office one day with Mr. West—

Q. Just a minute, Mr. Burckhardt, just answer my questions.

Q. What does this bill of \$778.47 cover, Mr. Burckhardt? A. That covers storage.

Q. On the entire shipment? A. Yes, sir.

Q. When was this shipment sold?

(Testimony of Charles A. Burekhardt.)

A. Sometime after March 20th. [156]

Q. Yes, but what time after March 20th?

A. I do not know.

Q. Did you have a sale for this shipment prior to March 20th?

A. Some of these goods were sold on arrival; some of these goods were to have gone to Manila at once.

Q. They were to go to Manila at once?

A. Yes, sir.

Q. Who were they going to at Manila?

A. To the Pacific Commercial Company.

Q. Who sold these? A. Kelley-Clark.

Q. How many of these goods were going to Manila at once?

A. I think there was two thousand cases.

Q. How did you fill that order for Manila?

A. I think they took it out of other stock; I am not positive just how it was filled.

Q. Did you have other stock on hand here at that time? A. I think there was.

Q. Was that other stock sold?

A. I could not say it was all sold; some of it was sold.

Q. Was there two thousand cases of this other stock that was unsold?

A. I do not remember, as a fact, Mr. Bogle, whether we took that or had some more salmon come down. I do not remember how we did manage that.

Q. Where was this other stock held here?

A. The Virginia people have all of our salmon.

Q. Do you remember how many cases there were

(Testimony of Charles A. Burckhardt.)

in this other stock? [157] A. No, sir.

Q. Was it the same grade of salmon?

A. Yes, sir.

Q. You took two thousand cases out of that instead of the "Jeanie" shipment?

A. That is my recollection.

Q. *Where* did this shipment go afterwards to Manila, about what date?

A. I do not remember that. I do not pay much attention to that part of the details of the business. Kelley-Clark are our sales agents. They look after all these details for us.

Q. Why do you say part of this shipment was going forward to Manila, why not a part of the shipment you were holding in the warehouse here, would it make any difference to you?

A. No. It is my recollection that this other shipment was sold, but not for immediate delivery. I think we staved these people off, or did something.

Q. If you do not know about this do not get it in the record, I want to get the facts here.

A. As I said to you, it is very hard for me to give you anything—

Q. Now, is it not a fact that if you had lost a sale of those two thousand cases of salmon, and had to replace two thousand cases of other salmon, and therefore lost the sale of two thousand cases and had been damaged that that matter would be rather fresh in your mind?

A. I have not said I was damaged any by not making a delivery, any further than I probably had to

(Testimony of Charles A. Burckhardt.)

pay [158] storage and these other charges against it, that would be the only damage.

Q. You are claiming interest on that salmon?

A. These charges that I have testified to.

Q. For delay in marketing the salmon. If there was no delay in marketing the salmon, you are not entitled to any interest?

A. There would naturally be delay in marketing if I had to delay a shipment on account of not having stock available.

Q. Did you have available stock?

A. That is what I am trying to tell you.

Q. Did you have available stock to fill this order?

A. I will have to get my records and look it up.

Q. Did you make any demand on Horner, or any request, that he rush the overhauling of any of this salmon, to meet this delivery?

A. I do not remember. I do not recollect whether I did or not.

Q. You do not remember when this salmon went forward to Manila, what boat? A. No.

Q. Would Kelley-Clark have that information?

A. I think they would.

Q. Were you or were you not delayed in marketing this salmon by reason of it being overhauled?

A. Well, that is a very hard question for me to answer, Mr. Bogle.

Q. Just answer it if you can, yes or no.

A. I cannot answer yes, that would not be a proper answer, [159] and no would not be proper. I will say that I could not answer that question, for

(Testimony of Charles A. Burckhardt.)

the reason that Kelley-Clark are in a better position to give you that information than I am.

Q. Would Kelley-Clark be in a position to give us the information as to the marketing of this entire pack? A. Yes, sir.

Q. And the length of time that it was held here in the warehouse? A. Yes, sir.

Q. Now, this insurance item of 93 cents per hundred per annum, you figure from January 10 to March 10? A. To March 20.

Q. You also figure storage for that time?

A. Yes.

Q. Have you the storage bill? A. Yes, sir.

Q. Have you paid that bill?

A. We have paid the bill, the regular bill; we have not segregated it at all. That is the rate we pay for our salmon at the Virginia warehouse, 25 cents for two thousand pounds.

Q. You have paid that bill on this salmon, have you? A. Yes, sir.

Q. If you had no market for this salmon at that time, between these dates, Mr. Burckhardt, you would have had to carry the salmon in the warehouse just the same, would you not? A. Yes, sir.

Q. You were superintendent of the Yes Bay cannery and [160] had general charge of it?

A. Yes, sir.

Q. When did you leave there?

A. I left there on the second day of October.

Q. You were not present, then, of course, when this salmon was shipped out of there?

(Testimony of Charles A. Burekhardt.)

A. No, sir.

Q. And know nothing about the conditions when it was shipped out? A. No, sir.

Q. What was the distance it would have to be trucked from the warehouse to the ship?

A. I would say about thirty feet.

Q. Did you have any salmon left over from the 1911 pack? A. No, sir; not at the cannery.

Q. Did you have any left over in Seattle?

A. I think we did have a little left over.

Q. Now, this statement which you were reading from as to the market prices of salmon, etc., when was that statement prepared?

A. I prepared it to-day.

Q. That coincides with the statement of Mr. Small, does it not? A. Yes, sir.

Q. Is it or is it not a fact you prepared that from Mr. Small's books? A. No, sir.

Q. How did you prepare it?

A. I prepared it from circular letters that we have on file from Kelley-Clark. [161]

Q. What do those circulars contain?

A. Stating the offerings of salmon at these dates and the prices.

Mr. BOGLE.—I move to strike Mr. Burekhardt's testimony as to the market value of this salmon on the ground that it appears that he had no personal knowledge, and he took it from records compiled by other parties.

Mr. HANFORD.—I think that is the only way figures can be obtained after the transactions.

(Testimony of Charles A. Burckhardt.)

A. I can testify as to prices of salmon. I can bring statements up here from Kelley-Clark showing the value of that salmon, what we were paid for it at these dates.

Q. What do you mean by that, what you were paid for this particular "Jeanie" shipment?

A. No, what we were receiving for salmon of these grades at that time.

Q. The actual sales? A. Yes, sir.

Q. Made at that time? A. Yes, sir.

Q. Would Kelley-Clark also be able to give us that information? A. Yes, sir.

Q. I think you said you moved some salmon during January and February, 1913, did you?

A. Yes, sir.

Q. Do you know when that salmon was sold?

A. No, sir.

Q. Was it salmon which had been sold during or preceding winter for future delivery? [162]

A. I would have to refer you to Kelley-Clark, our salesmen.

Q. How did Kelley-Clark handle this salmon for you? If they have a sale, do they notify you to deliver a certain amount of salmon? A. No, sir.

Q. Or do they have the warehouse receipts?

A. They go right ahead and sell our salmon on agreement we have with them as to the prices, and they ship it out and attend to the collections.

Q. How did they get hold of the salmon?

A. The warehouse turned it over on receipts. Warehouse receipts.

(Testimony of Charles A. Burckhardt.)

Q. You delivered the warehouse receipts to them and they shipped the salmon? A. Yes, sir.

Q. If Mr. Small of Kelley-Clark had desired to obtain any of this "Jeanie" shipment, then it would have been necessary for him to present a warehouse receipt to the Virginia Street warehouse, and either make demand upon them or Mr. Horner for this salmon. He could not get it otherwise?

A. No, sir.

Q. In this claim for this period from January 10 to March 20, that covers the entire period that all of this salmon was in there, from the time Horner started to overhaul it until he had completely overhauled the entire twenty-nine thousand cases, does it not? A. Yes, sir.

Q. Now, during that period of two months or more, as time [163] progressed, he, of course, had a larger amount of available salmon ready for shipment? A. Yes, sir.

Q. So that in no event were you delayed for that period in disposing of the entire 29,000 cases?

A. I think we had other salmon that we brought down shortly after.

Q. Do you know when that was?

A. I do not remember the dates.

Q. That was also available for sale and delivery?

A. Yes, sir.

Q. Do you remember when all that salmon was sold?

A. It was all sold during the early part of 1913. I do not remember when deliveries were made on it;

(Testimony of Charles A. Burckhardt.)

it was practically all cleaned up.

Q. You stated before that you did not know whether it was all delivered before September or not.

A. No. Our 1912 pack was all sold at the time I came back from the cannery, it was all sold.

Q. Your bills of lading were delivered to the warehouse man? A. Yes, sir.

Q. And, as far as you know, they are still in his possession? A. Yes, sir.

Q. Mr. Burckhardt, was this salmon in any better condition, after Mr. Horner reconditioned it than it was at the time it was offered for shipment to the "Jeanie"? A. Any better condition?

Q. Yes. A. No. [164]

Q. Was the reconditioning or overhauling by Mr. Horner such that it placed you in a better position to dispose of this pack? A. No, sir.

Q. It appears from Mr. Horner's report, I think Claimant's Exhibit 1, that there was some 58 cases of swells taken out of this shipment? A. Yes, sir.

Q. Now, if this shipment had gone forward, they would have come back as a claim against you?

A. Some of it probably would.

Q. Mr. Horner also testified that he guaranteed every case overhauled by him, and stood back of every case where claims were made against it. Now that would relieve you of any claims of any kind or description?

A. Who did he give that guaranty to?

Q. You know nothing about that guarantee?

(Testimony of Charles A. Burckhardt.)

A. No.

Q. If Mr. Horner made such a guarantee relieving you from possible claims, would not that be a benefit to you in the disposition of this salmon?

A. No, I do not think it would. We do not require any guaranty on our pack.

Q. Well, a guaranty on the pack relieving you from any possible claims?

A. I do not know anything about Mr. Horner's financial condition, whether his guaranty would be of any value to us or not.

Q. If it is of value?

A. As a matter of fact one-sixth of one per cent of swells [165] and puffs picked out of a shipment of thirty thousand cases is a very low estimate.

Q. You figure one-sixth of one per cent?

A. One-sixth or one-fifth of one per cent on thirty thousand cases.

Q. You figure the overhauling was of no benefit to you? A. No.

Q. Even with Mr. Horner's guaranty back of it?

A. No.

Q. You paid Horner's entire bill, did you?

A. Yes, sir.

Q. Is there not an item of a hundred and some odd dollars still unpaid? A. Of Horner's bill?

Q. Yes.

A. Not that I know of.

Q. Well, you do not know anything about that?

A. No.

Q. Was this cargo insured by you, Mr. Burck-

(Testimony of Charles A. Burckhardt.)

hardt? A. Yes, sir.

Mr. BOGLE.—We make demand for these insurance policies, not now but to be produced during the progress of the case.

Mr. HANFORD.—We will produce them if we have them.

Q. In making foreign shipments, Mr. Burckhardt, do you overhaul or go over the cases as they arrive from Alaska before shipping them?

A. Do we overhaul them?

Q. Yes.

A. We never overhaul them unless the buyer wants to make an examination, he then gets it subject to examination [166] or later on there.

Q. Do you make any extra preparations when you are going to make a foreign shipment?

A. We might perhaps strap the cases; sometimes they demand strapping.

Redirect Examination.

Q. (Mr. HANFORD.) Have you collected any insurance for this damage from the insurance company? A. No, sir.

Q. Have you made any claim on the policies?

A. No, sir—yes, we made a claim on them but they stated that it was not covered under our policy; only P. P. I. policy responsibility in this case.

Q. Is there any controversy pending as to the liability of the insurance people? A. No, sir.

Q. According to Claimant's Exhibit 1, which is a statement made by Mr. Horner of this entire shipment of 29,000 odd cases, there were 58 cases of

(Testimony of Charles A. Burekhardt.)

swells. Would that number of swells in that number of cases be sufficient to condemn the shipment?

A. No, sir.

Q. Or interfere with the marketing?

A. No, sir.

Q. What would be the effect if the salmon had been sold with that number of cases and discovery of the swells, what would be the process of adjustment?

A. They simply make a claim to us that that amount of swelled salmon has been discovered, within six months [167] after shipment.

Q. Is that a large or small average of swells?

A. That is a small average.

Q. In your position as a business man engaged in the salmon-packing business and marketing of salmon, keeping track as you have stated you did of the market price, you have an independent recollection of the market price in January, 1913?

A. Yes, sir.

Q. The memorandum prepared by you today from the Kelley-Clark circular, did that memorandum or circular which you prepared from the original sources of information merely verify your recollection?

A. It simply verifies my recollection of the prices.

Q. Having reference to that and having in mind your own memory of the matter, you state these facts as testimony that you are willing to stand by?

A. Yes, sir.

Q. (Mr. BOGLE.) Mr. Burekhardt, from your independent recollection, what was the market value

(Testimony of Charles A. Burekhardt.)

of these salmon in January, 1913?

A. Pinks 65 cents a dozen; chums 62 $\frac{1}{2}$; medium reds \$1.15.

Q. What was the price in February, February 1st, 1913—that was the opening market price was it?

A. Yes, sir. The market price of chums during the month of February were selling from 57 $\frac{1}{2}$ to 60 cents; pinks 65 cents; medium reds somewhere around 95 cents and one dollar.

Q. That is merely your recollection from keeping in touch [168] with the market, not from any actual sales made, that is the asking price?

A. That was the actual market price at that time which goods were selling for.

Q. Did you sell any during that time?

A. Yes, sir.

Q. During January and February?

A. Yes, sir.

Q. Now what sales did you make?

A. I could not tell you the exact sales, but I am positive that we sold salmon at those prices at that time.

Q. You are positive of that fact, are you?

A. Yes, sir.

Q. During January and February, 1913?

A. Yes, sir.

Q. For delivery, when?

A. I think it was immediate delivery then—some-time within thirty days.

Q. You have no recollection who you sold to?

A. Not without getting hold of our invoices. If I

(Testimony of Charles A. Burkhardt.)

had my invoices I could tell you; but I keep in pretty close touch with the market.

Q. Would Kelly-Clark have all that information?

A. They would.

Q. Have all the information you have?

A. Yes, sir.

Q. As to sales made for you during that period?

A. Yes, sir.

Q. Would they have all the information as to the amount of salmon you had on hand during that period? [169]

A. Yes, sir.

Q. Mr. Burkhardt, did you in your capacity as president of the Alaska Pacific Fisheries, or did the Alaska Pacific Fisheries, to your knowledge, make any claim against the steamship "Jeanie" or her owners, for this \$4283.06, if so, when?

A. Yes, we did.

Q. When? A. I could not tell you the date.

Q. Could not tell us the date? A. No.

Q. Was it in February or March, 1913?

A. No, it was after we paid this bill.

Q. It was in April?

A. Sometime after that time, I do not remember the date.

Q. Did you as president of that company, or the company ever make claim against the steamship "Jeanie," or her owners for this \$2,500 depreciation in salmon after the same was overhauled or reconditioned, prior to the bringing of this suit?

A. Not that I know of.

(Testimony of Charles A. Burckhardt.)

Q. Did you as president of the Alaska Pacific Fisheries ever make claim against the steamship "Jeanie" or her owners for the item of three months' interest, amounting to a thousand dollars, set out in paragraph 11 of your libel?

A. Not that I am aware of.

Q. Did either you, as president of the Alaska Pacific Fisheries or the Alaska Pacific Fisheries, ever make claim against the "Jeanie" or her owners for the item of two thousand cases which were damaged so that they [170] were unsalable amounting to \$4,500, as set out in paragraph 12 of the libel?

A. Not that I know of.

Q. Never made claim prior to bringing the suit?

A. Not that I know of.

Q. Did you, as president of the Alaska Pacific Fisheries ever make claim against the charterer for any of these items, with the exception of Horner's bill? A. Not that I know of.

Q. Did you ever make claim against them for Horner's bill?

A. I think we did. We have a letter from the owners.

Q. That was made subsequently?

A. That was made prior to the bringing of the suit.

Q. How long after the bill was paid?

A. I do not remember the dates.

Q. Was that demand made in writing?

A. I could not say as to that. We were going to libel the vessel and Swan brought us this letter guaranteeing that if the "Jeanie" was liable for this, that

(Testimony of Charles A. Bureckhardt.)

they would pay it, so that we would not libel the vessel and she could proceed on her voyage.

Q. If the "Jeanie" was libeled—

A. That they would be responsible for our bill.

Q. Was it not that they would put up a bond in this suit? Is that what you mean? You don't mean that they would pay all these damages you are claiming?

A. I do not think the damaged cargo was mentioned at that time, it was simply that they would pay what they were liable for; we were going to libel the "Jeanie."

Q. That is a matter that you took up through Kerr & McCord [171] was it not? A. Yes, sir.

Q. To arrange for a bond in case the libel was filed, is not that what you refer to?

A. No, they gave us a letter.

Q. Have you that letter here?

A. I think Mr. Kerr has it. I think Mr. West knows something about that thing. We were going to bring suit and libel the vessel, and we were trying to compromise the thing through Mr. Foreman, and we did not want the vessel to go out, because if she were lost we would have no claim, so they gave us this letter to protect our interests in case anything should happen to the "Jeanie."

Q. It was to take the place of the "Jeanie" in case you brought suit?

A. That is about what you might say it was.

Q. So that you would not have to make an actual seizure?

(Testimony of Charles A. Burckhardt.)

A. We were trying to adjust the matter at that time.

Q. That is about the time you brought the libel, was it?

A. No, the libel was brought long after that.

Q. You do not know when you made this claim, even approximately? A. No, I do not.

Q. (Mr. HANFORD.) State as well as you can, Mr. Burckhardt, what negotiations or controversy was pending, from the time of the reconditioning of the goods until this suit was commenced, if you had any dealings about that, what claim you were making, or what progress was made toward [172] getting a settlement of this matter before suit was brought.

Mr. BOGLE.—I object as incompetent and immaterial.

Q. I will change the question to obviate that objection. Have you made any claim, that you know of personally, against the "Jeanie" or her owners or representatives for this damage; if so, who was that presented to or in what way was that claim asserted?

A. The original claim we put in?

Q. The whole of it. You have answered that you did not make any claim for these specific items. Did you make any general claim?

A. No, sir. The only claim that we made was, Mr. Foreman and I were discussing trying to settle this matter of the overhauling charge of this salmon.

Mr. BOGLE.—I object, Mr. Foreman not being a party to this suit.

(Testimony of Charles A. Burckhardt.)

A. (Continuing.) He represented the insurance in the matter.

Q. I do not inquire about that. I want to know of any claim against the ship or her owners or representatives?

A. No. Mr. Kerr handled that matter for us.

Q. Do you remember about what time you put the matter in the hands of Mr. Kerr to get a settlement?

A. Immediately, at the time Mr. Horner presented his bill, and before the same was paid.

Mr. HANFORD.—If you can produce any insurance policy or contract of insurance, if you will furnish them to me, I will let Mr. Bogle see them.
[173]

It is admitted that the libelant is a corporation organized and existing under the laws of the State of Oregon.

Mr. HANFORD.—As to the claims mentioned in paragraphs 10 and 12 of the libel, subject to a conference with Mr. Kerr on the subject, I give notice to counsel that we will apply to the Court for leave to amend the libel by alleging that during the period of delay when the goods were being reconditioned, the market price thereof decreased and the libelant sustained further loss by depreciation and diminished market value amounting to \$7935.40; and by reason of said delay libelant incurred expense for shortage amounting to \$778.47, and cost of insurance \$150.47.

(Witness excused.) [174]

[Testimony of W. H. Horner, for Libelant.]

W. H. HORNER, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HANFORD.) What is your business or occupation?

A. General handling of canned salmon and inspecting.

Q. Were you engaged in that line of business in January, 1913? A. Yes, sir.

Q. Do you recall the trip of the "Jeanie" in that month when she brought some canned salmon from Alaska? A. I do, sir.

Q. Can you fix the date on which she arrived or commenced to discharge her cargo?

A. Not without referring to the records, I could not,

Q. Well, in a general way, as near as you can. Do you know, however, that it was in the month of January?

A. Along in the month of January, yes, sir.

Q. Were you expecting to visit her on her arrival?

A. I was.

Q. For what reason?

A. Directions from the charterers or owners that there were some damaged goods aboard; they expected to find some damaged goods.

Q. State the occurrence in the morning when you were there?

A. I was making my usual rounds on the waterfront to the different warehouses and docks where

(Testimony of W. H. Horner.)

salmon are stored, and as I got to the Virginia Street warehouse I looked across the street and saw the "Jeanie" tied up at pier 10 on the north side, and they were taking off the hatches at that time. I went in the warehouse for a few minutes and came out and went aboard the [175] steamer and saw them taking wet cases from the hatch, right at the top of the main hatch. I stood around a few minutes and saw possibly two sling loads of wet cases came out. I went to the office and called up the Alaska Pacific Fisheries and notified them that there was wet cases in the top of the hatch and that they had better send somebody down to look after it. After doing that I went ahead about my business and paid no more attention to the discharging of the cargo. But at different times when I was passing I stepped in and saw the crew on the dock trying to segregate the damaged cases, those that were wet, from those that appeared to be dry.

Q. Now, while you were there, when you first saw them taking cases out of the hatch, give us an idea, approximately, of the number of cases that you observed that were wet. I want to know whether just two or three or a considerable number?

A. Oh, no, the square of the hatch, there was at least three-quarters of the cases at the top of the hatch—they had not got below the deck—that was wet. When they got in the hold of the ship I did not pay any attention, I notified the company that the salmon belonged to, and left it to the warehouse company to separate the salmon as it came out on the

(Testimony of W. H. Horner.)

dock, where they had a chance to see from both sides of the truck loads.

Q. You were passing and observed the discharging of the cargo, did you, while they were doing it afterwards?

A. At different times I was on the dock and saw the cargo coming from the ship's tackle to go in the dock and be examined and sent to the warehouse across the street. [176]

Q. Did you notice the condition of the cases then as they were coming out?

A. A lot of cases were more or less blacked up with coal-dust, water-marks, apparently bilge water, and a lot of them there was water running out, that is the cases were still wet.

Q. What was being done with reference to segregating the wet cases from the others?

A. There was quite a number of men on the dock watching each truck load, and also watching as they were put on the conveyor after they had piled out all the damaged ones that they could find, and other parties were watching on the other end of the conveyor to see if they could find any damaged.

Q. Do you know whether any officer of the ship in charge of the work was taking observations of these cases?

A. The first mate was there, I think it was the first mate, coming out of the hatch there, back and forth from the dock to the hatch.

Q. Do you know his name?

A. I do not, sir.

(Testimony of W. H. Horner.)

Q. Were you present at a conference between interested persons with respect to this cargo when it was discharged? A. I was.

Q. State who the gentlemen were that attended that conference?

A. Mr. West representing the insurance company, Mr. Dawson representing the steamship company, and Mr. Hall the warehouse company and Mr. C. A. Burckhardt, the packer. [177]

Q. You spoke of Dawson representing the steamship company. What company is that?

A. I believe Dawson at the time was interested in the charter of the "Jeanie" on this trip, and he was there representing Mr. Swan.

Q. (Br. BOGLE.) Do you know that?

A. Only from Mr. Dawson's own say so. He says I am here representing Mr. Swan.

Q. (Mr. HANFORD.) Where was this meeting?

A. It was right out in front of one of the wet piles, on pier 10, where the salmon was discharged.

Q. Now state what was done at that meeting, or concluded.

A. Well, some one of the parties, I do not know which one it was, said it was agreeable to overhaul the cargo and recondition it, and the balance of them voiced that sentiment, and agreed that I should do it, put it in a proper marketable condition, that was agreeable to all parties.

Q. Did you do that afterwards?

A. I did, sir.

Q. Now, state as particularly as you can, what you

(Testimony of W. H. Horner.)

found in handling the cargo, and what you did about it.

A. There was something like 2,000 cases, I think, that were set out on the dock as being damaged, and the balance went to the warehouse supposed to be in good condition. I put a crew on part of the side of the dock and started the work, and was taking up too much space as they had little space to spare, and we went over to the warehouse and finished up there, relacquered and labeled. [178]

Q. How soon did you commence on the dock?

A. After all the parties agreed I should do the work.

Q. How soon after it came out of the ship?

A. I think possibly forty-eight hours, something like that. A very short time. As soon as they found out practically the amount of damage, these different parties got together, and delaying matters did not help any.

Q. Proceed in your own way and tell what you did.

A. We went in the warehouse to clean up one parcel, that is one brand of this damaged salmon, that we had not started on the dock. Well, the crew worked on them, and while they were doing that I looked around some among the salmon supposed to be all right, and I found cases right on the face of the pile that were almost as wet as some that were set out on the dock. I opened them and found the same condition as the others on the dock, and in going through to see how they were I found cases that were

(Testimony of W. H. Horner.)

all stained, that is inside, all covered with dry coal-dust, as well as some moisture from the dampness. These cases are not perfectly tight, there is a two-piece bottom on almost all salmon cases, permitting dampness to get in and this coal-dust would discolor the can, and that being the case I overhauled and reconditioned the whole parcel, and turned in the figures for them to the Packer and the Swan Navigation Company and also the insurance people. I first turned it over to the insurance people, and they said tender it to Swan and he said hand it to the packer. So all three parties had the bill and a statement of the amount of cases overhauled and material and labor [179] necessary to recondition.

Q. How many of the cases did you actually open?

A. Every case in the entire cargo. I can give the exact figures if you want them.

Q. No. What was the reason or necessity for opening every case?

A. I found cases that were apparently all right on the outward appearance, that were more or less covered with coal-dust. Cases where we would maybe find six cans along the inner edge or down the center where the crack is and where two pieces of the bottom came together. We would find coal-dust all over these cans necessitating the opening of these cases to put the cargo in first-class condition. They specified the cargo to me and not the damaged stuff that was set aside.

Q. Besides the cases being wet, what was the actual condition of the cans?

(Testimony of W. H. Horner.)

A. The cases had been wet and we had to whittle a lot of the labels off, due to the salt water starting rust on the cans, and they were still wet, and had started rust in different parts of the cans and the coal-dust had a tendency to dirty the cans as well as stain the labels more or less.

Q. What was necessary to be done with the cans where the rust had started?

A. They had to be cleaned with steel wool and benzine and then lacquered to prevent rust starting again.

Q. What proportion of the entire cargo did you remove the labels from? I do not mean the number, but what proportion. [180] I want to know whether you had to remove all the labels.

A. Oh, no. We removed only what was absolutely necessary. I used 198,200 new labels. There was 3964 cases lacquered and labeled.

Q. (Mr. BOGLE.) What are you reading from?

A. From a copy of a statement made out to the Swan Navigation Company. 29,657 cases overhauled. 3964 cases lacquered and relabeled. 124 cases lacquered only; that was unlabeled stuff they had to be lacquered. There was no labels on it when it came down.

Q. Is that all you had of these unlabeled cans?

A. 4088 cases cleaned and wiped that did not have to be relacquered, took the coal-dust off with benzine rags. 3964 cases we scoured and cleaned that was rusty, stuff that we found in the parcel.

Q. Are these cans you speak of that came down

(Testimony of W. H. Horner.)

without labels on, did you put labels on them?

A. No, sir.

Q. Just lacquered?

A. Just lacquered and put them back in the same cases where I got them and put a new side on where broken or a new bottom, to make a good parcel, such as received at the cannery.

Mr. BOGGLE.—I object, the witness could have no personal information as to what condition the shipment was when taken out of the cannery.

A. My dear sir, I have been in lots of canneries, dozens of them.

Mr. BOGGLE.—You might have an idea but you do not know [181] personally what condition the shipment was in.

Mr. HANFORD.—We will show that.

Q. (Mr. HANFORD.) In regard to the cases themselves, these boxes, what about them? What did you do in regard to supplying new boxes?

A. Where I could put a new side or a new bottom on a case and make it a complete case I did it. Where the cases were stained so that they looked like a damaged case when a merchant would open them, they were thrown aside.

Q. How many new cases did you actually supply?

Mr. BOGGLE.—We have no objection to the introduction of the bill of Mr. Horner, it shows all that information.

A. There was 2650 new cases. 2300 extra sides. 5950 extra tops, that was tops and bottoms both.

Q. Is that your bill?

(Testimony of W. H. Horner.)

A. Yes, sir, that is in my handwriting.

Q. Is that the original?

A. That is my segregation showing the amount of each brand, etc., that was overhauled.

Mr. HANFORD.—We offer this bill in evidence.

Paper marked Libellant's Exhibit "A," filed and returned herewith.

Q. What is the extent of your experience in this line of work. How many years have you been engaged in it? A. Fourteen and a half years.

Q. During that time have you been active and handled a great many cases, a great many consignments of canned salmon?

A. I have handled practically all of the Alaska salmon, [182] with the exception of one packer that came to Seattle in the last nine years, on a contract basis.

Q. From your familiarity with handling that line of goods are you able to definitely determine, so as to know in your own mind, the cause of such conditions as you found in this consignment?

A. I should say, yes; when I saw it coming out of the ship wet, with only a part of the cargo wet and the balance showing the condition it did.

Q. With regard to the coal-dust you found or dirt, or rust on the cans, can you form an opinion as to when and how that occurred?

A. Only by the report of the officers.

Q. Is there any inherent condition in canned salmon that is likely to deteriorate the goods in making a sea-voyage, when properly packed? A. No, sir.

(Testimony of W. H. Horner.)

Q. In doing this work of reconditioning this consignment, for whose particular interest were you careful to get the best results? A. My own.

Q. Well, in regard to the other parties, were you a partisan anyway, as between the interests of the owner of the cargo and the charterer of the ship?

Mr. BOGGLE.—I object as immaterial.

A. I guarantee all the work I put out; I stand behind it and protect both the insurance company, the steamship company and the packer against any claims coming in; they will not fall on them but fall on me personally.

Q. The amount you charge for materials and service in [183] reconditioning this cargo, how does that compare with the actual and necessary cost, or the reasonable cost for the value of the service?

A. It is a just cost. I submitted bills from different parties for different materials bought in large quantities and at wholesale prices.

Q. To whom did you render your bill for payment?

A. The insurance company, Swan Navigation Company and the packer.

Q. Who paid it? A. The packer.

Q. And you were paid the full amount, the actual amount as shown on this bill? A. Yes, sir.

Q. When was that paid?

A. That was paid—I haven't got this bill receipted, I would have to look at my book at the office to see when it was paid. It was some two or three weeks after the bill had been rendered, because the parties had not made up their minds just who was going to

(Testimony of W. H. Horner.)

pay it. It was some time after the bill had been rendered. The date of that bill is March 21.

Mr. BOGLE.—This exhibit shows the bill as paid April 8, 1913.

Q. Had all of the cans been lacquered?

A. No, only those we reconditioned.

Q. I mean when they were packed?

A. No. Some were lacquered. Most of them had the enameled top and bottom.

Q. And then the label? A. Then the label.
[184]

Q. Around the body of the can? A. Yes, sir.

Q. Could the wet or stained or soiled condition of the cans be caused by the ordinary sweating of the cargo?

A. None of the cans I saw, no sweat that would cause the stain on the labels.

Q. What was the appearance generally of this lot of salmon as to having been well packed and fit for market?

Mr. BOGLE.—You mean well packed into the ship or into the cases?

Mr. HANFORD.—Into the cases.

A. The salmon we overhauled and put back in the pile ready for shipment, we found in A1 condition, in fact had been shipped out all over the country and had no complaints or objections whatsoever to any of the conditions. The balance of the cargo that was reconditioned, has been shipped also, but there has been no complaint from it. Some of it has been shipped to foreign countries and we have had no

(Testimony of W. H. Horner.)

complaints or claims from any source where this salmon was shipped. We found it in good condition, the cans clean, labels well put on. In going through the cargo I found sometimes four, six or eight cans to the case that had to come out due to coal-dust, where the case was apparently dry and looked all right from outward appearance.

Q. I wish you would state what you observed with reference to the style or manner of packing and the condition of the goods before they were shipped at the cannery.

A. The only reference I can give to that is some seventy or a hundred thousand cases that I had received previous [185] to this shipment coming down, that I merely made an examination for condition and quality and reported that.

Q. Could you judge from the appearance of the cases whether at the cannery, before they went into the ship, they had been properly packed for market?

Mr. BOGLE.—This witness could not tell the condition of the shipment before it was loaded aboard the vessel at the cannery. I object.

A. I can only say the condition of the previous cargoes, the same pack, the same year; I have never been at their canneries.

Q. Did you examine any consignments coming from these same canneries, that came subsequently to this? A. Yes, sir.

Q. What condition did they come in?

Mr. BOGLE.—I object as incompetent and immaterial.

(Testimony of W. H. Horner.)

Q. I want to show the condition of competency of the owners of this cargo in putting up their goods for market, by what appeared in these cases and previous consignments, and consignments that you know about?

A. On the previous shipments we found a few cases sprung and that is a trifling loss; the contents we found to be all right, and making an examination for foreign buyers, I found both the contents of the cases as well as the contents of the tins A1.

Cross-examination.

Q. (Mr. BOGLE.) Mr. Horner, have you a contract with the Alaska Pacific Fisheries to overhaul and recondition all their salmon? [186]

A. I have a contract, I have a printed price list for my services, subject to any and all, transportation, insurance and packers, with the exception of one packer.

Q. That includes the libelant in this case, the Alaska Pacific Fisheries?

A. Yes, sir. If he wants my services I have a price for him, if he pays the price he can get it.

Q. Mr. Horner, could you give us some estimate or idea of the number of cases overhauled and reconditioned by you during the season?

A. Overhauled and reconditioned, you mean by that general handling and preparing for shipment?

Q. Yes, sir, for the eastern or foreign market.

A. Oh, I should say, something like 700,000 cases.

Q. The season. What proportion does that bear to the usual pack which passes through here, the

(Testimony of W. H. Horner.)

Alaska packing season?

A. Depends altogether on the season up north. It will average about 700,000 a year for the last three or four years, general handling by myself here in Seattle.

Q. What proportion is that to the entire pack, just roughly?

A. It is about one-quarter of the pack that comes in here. The Frisco pack I pay no attention to.

Q. That one-quarter of the pack includes the Sound pack?

A. No, just the Alaska pack that comes into the city of Seattle, shipped through Seattle.

Q. You did not overhaul any of the Sound pack, did you?

A. I overhauled 65,000 cases for one packer this season.

Q. As a rule, do you overhaul very much of the Sound pack, Mr. Horner?

A. Very seldom. I make a specialty of Alaska business. [187]

Q. Is there any difference in the condition of the Sound pack and the Alaska pack, which makes it necessary to overhaul the Alaska pack, that is, overhaul a larger proportion?

A. The Alaska pack the canneries are so situated that they cannot tell during the selling season as to how much of this brand or that brand they are selling, therefore they are compelled to bring a certain amount of salmon down unlabeled to take care of their sales on particular brands, where they have

(Testimony of W. H. Horner.)

three or four brands for each grade. The Puget Sound pack are all in touch and are able to get their orders within a few hours and fill them as they are packing, and they have plenty of help. It is not like the short season in Alaska. The general overhauling and labeling is all done here on the Sound in the canneries as the orders come in.

Q. Then, Mr. Horner, it is customary to overhaul quite a large proportion of the Alaska pack upon arrival in Seattle before shipment to eastern or foreign markets, is it not?

A. Out to the westward and in Bering sea principally, some in southeastern Alaska. We have very little business out of southeastern Alaska, due to the fact that they have boats practically the year round and can clean up the packs by getting their orders by cable, and take care of their orders as they come in.

Q. Where are the canneries of the libelant in this case, Yes Bay, Chilkoot and Chomly, situated in Alaska?

A. Chomly cannery is on Chomly Sound; Yes Bay I think down near Ketchikan, and Chilkoot cannery is a short ways from [188] the last mentioned. I think that is where they are. I have never been to the canneries; never been in Alaska.

Q. All these canneries are in what are called Southeastern Alaska?

A. Southeastern Alaska in the regular meaning of the salmon district. That same question would apply, as the Judge asked me as to the condition of

(Testimony of W. H. Horner.)

the canneries. I have never been in those canneries. I have been at Vancouver, B. C.

Q. That is whether they were in the southeastern or whether in the westerly?

A. They are in the district called southeastern.

Q. Do you know what proportion of these cases in this particular shipment were labeled and lacquered and ready for market?

A. There is a statement attached showing the exact number.

Q. Have you that statement? A. Here it is.

Q. What I want to get at is, the number of the entire shipment which were lacquered and labeled at the cannery before the shipment for Seattle.

A. This is it here. There is 1583 unlabeled medium reds; and ninety more unlabeled, the balance of it labeled. Here are the brands, Empire, Star, etc.

Q. All of these cases were labeled and lacquered with the exception of these two lots which you have mentioned, amounting to 1673?

A. Some lacquered, mostly with lacquered tops and bottoms.

Q. Aside from that was there anything to be done to place them on the market? [189]

A. Merely to open; we took out any and all cans we found stained with coal-dust in the dry cases.

Q. What I am getting at, Mr. Horner, was there anything to be done to the balance of the shipment, providing there was no damage, was it in such con-

(Testimony of W. H. Horner.)

dition that it could be placed on the eastern or foreign market?

A. 1600 and some odd cases would have to be labeled, the balance nothing to be done.

Q. They were all ready for the market?

A. Ready for market. Nothing more, as far as the packers were concerned. Some foreign buyers might want the cases iron strapped outside. The packer was ready with the exception of this 1600 cases.

Q. Mr. Horner, when do you do most of the overhauling of Alaska shipments, at what period of the year?

A. Beginning about the middle of August up until the middle of January we are busy with a big crew.

Q. When does the largest proportion of these shipments come down?

A. From the middle of September until the latter part of October. The first of September until the latter part of October. I think we do get salmon from southeastern Alaska in July, but the heavy shipment is between these other dates.

Q. When does the salmon season close, the big season, if you know, in Alaska?

A. There are different times for different districts.

Q. Southeastern Alaska?

A. I think they close some time—there are different grades that run different times. Take the red run, the pink run; [190] this medium red run was late; but the fishing season I am not acquainted

(Testimony of W. H. Horner.)

with up there. The Puget Sound season starts in the latter part of July, and they keep on fishing and canning until in the latter part of December on the different grades as they run.

Q. I am talking about Alaska.

A. Alaska I am not acquainted with.

Q. Then in shipments of this kind and size, Mr. Horner, would it or would it not be customary to overhaul or examine the entire shipment before passing it to be shipped to an eastern or foreign market?

A. No, when a ship comes into the dock and gives a clean bill of lading, we never look into it, unless it is the first shipment of the season, and then we come down and open a number of cans to get at the condition and quality; we look at the labels and make an examination of the condition of the parcel and make an examination to protect the packer, broker and buyer.

Q. Then do I understand you to say that if this shipment had not shown on the surface some wet cases that you would have made no examination or overhauling would have happened, and it would have been forwarded to the eastern market?

A. Not until the goods had been sold. Then the 1600 and some odd cases of medium reds unlabeled would have had to be labeled.

Q. You would not have examined the entire shipment unless it showed exterior damage?

A. We had previously made examinations of the pack and found it to be all right. [191]

Q. You would have made no particular examina-

(Testimony of W. H. Horner.)

tion of this shipment? A. No.

Q. It would have been passed to the eastern market?

A. It would have been passed to the domestic or foreign market as all right. The balance of the pack was all right. We would have to examine every parcel that goes foreign. We have to make an examination on account of all these shipments.

Q. You have to examine every package?

A. No, not every package. You are entitled to open ten per cent of the parcel until you are satisfied that the quality is all right. You may cut into every twenty-five or thirty cans or you may go in every 200, depending on the size of the parcel. But you take them from here and there from all parts of the pile, taking the weights and condition and quality.

Q. Mr. Horner, if this shipment had been packed for five or six months and had been lying at the cannery during that time, would it be customary to make an examination or overhaul the shipment on arrival here? A. No, sir.

Q. There is no deterioration or damage by discoloration or otherwise to a shipment that lies five or six months in an Alaska cannery?

A. I have had shipments come here that had stood at the cannery all winter and they came down here and they were in good condition; the labels were not loose, the cans had not rusted and they were in perfect condition.

Q. That would not apply to all shipments coming down? [192]

(Testimony of W. H. Horner.)

A. That would apply to all shipments if they were not damaged by water. I have received them from all districts in Alaska when they left them there over the winter.

Q. It would be immaterial where they were packed or where they were held at the cannery?

A. As long as they are held in a dry place.

Q. In a dry place. If they were not held in a dry place?

A. The can is liable to get wet, and you would find the label loosened up on you.

Q. Now, Mr. Horner, you stated that you were expecting to visit the "Jeanie" upon her arrival. State what you mean by that, I did not quite get your explanation?

A. Mr. Swan, I don't know whether by cable or how he received the facts, stated that the "Jeanie" had some damaged salmon aboard, and he telephoned down to the Alaska Pacific Fisheries office stating that there were damaged salmon. And I cannot state positively whether I saw Swan on the street, but he called my attention to it or I was notified from the office that when the "Jeanie" came in there was liable to be a little work because Swan reported damaged salmon.

Q. Do you remember when that information was first conveyed to you?

A. That was the day before the "Jeanie" got in, I think.

Q. You do not know where Swan had received his information that the salmon was damaged?

(Testimony of W. H. Horner.)

A. I understood it was by advice from the ship; supposed by cable.

Q. That you do not know?

A. No. He did not know anything. He said there was some. [193] damaged salmon on the ship.

Q. You, of course, did not know the condition of this salmon at the time they were loaded aboard the ship in Alaska? A. No.

Q. That was sometime in December that they would be loaded? A. When it was loaded.

Q. Where were they taking the salmon from when you first noticed it, Mr. Horner?

A. Taking them out of the main hatch; the large hatch right in front of the pilot-house, in front of the bridge.

Q. How many hatches has she forward, do you know? A. Has two, I think.

Q. And this hatch from which they were taking these wet salmon was that one immediately in front of the pilot-house?

A. Yes, right in front of the pilot-house, the big hatch.

Q. Did you notice, or make any examination, to see where the salmon was coming from?

A. The cannery marks on the cases?

Q. No, from what portion of the ship?

A. Coming right from the top of the hatch; they had not cleared the hatchway; merely had the tarpaulin covers off and were getting down under the deck.

(Testimony of W. H. Horner.)

Q. This salmon was immediately underneath the main hatch forward of the pilot-house?

A. It was.

Q. And the salmon, you said, was in a wet condition? A. The cases were wet.

Q. Were you present during the entire time that this salmon was being taken out of the "Jeanie"?

A. No, sir. [194]

Q. Did you know, or could you state, from what portions of the ship the wet salmon was taken?

A. No. All I saw was right in the top of the hatch, the cases were wet and I had no interest in it whatsoever outside of when they got ready for me to do business. I had business to attend to and there were enough people there to look and see where it came from when they were segregating it; and when they got it segregated it was time enough for me to go in.

Q. You were not present when the salmon came out of the ship and was segregated on the dock?

A. Only as they started the main hatch. I stopped at times going up and down the water front; they were still segregating it.

Q. Were they still unloading from the main hatch?

A. They were still unloading from the main hatch and taking some out forward, another hatch near the fore-castle-head.

Q. Did you see any damaged salmon coming out of any of the after hatches?

(Testimony of W. H. Horner.)

A. I did not pay attention to it. I do not know what came out.

Q. Did you see any damaged salmon unloaded from the between decks or the lower hold?

A. I did not pay attention to it. As I say I went aboard and saw the hatches off and found wet cases before they got down below the deck and I went and reported that to the Fisheries office.

Q. What was the condition of these cases, was there considerable water?

A. The cases were wringing wet all around.
[195]

Q. That was underneath the hatch?

A. Right underneath the hatch, that is in the square of the hatch. If you have six or eight crews up and down the water front to look after you cannot spend much time looking at damaged cargo coming out. I had nothing whatsoever to do with the cargo until after it was segregated when I would be ready to go ahead.

Q. Mr. Horner, was this hatch from which the salmon was taken immediately in front, forward of the large hatch?

A. It was the great big hatch—have you seen the boat?

Q. Yes.

A. That is the one the salmon came out of, that was the large hatch, where they had their slings, that is the main hatch.

Q. Did you notice whether any of that salmon coming from the main hatch, whether any of it was

(Testimony of W. H. Horner.)

damaged by coal-dust?

A. That I could not say. There was salmon on the dock damaged and cases all stained; some were all black all around. What hatch they came out of I do not know. The segregation was made on the dock after coming on the inside.

Q. You did not notice the salmon damaged by coal-dust until after it had been unloaded and segregated on the dock? A. No.

Q. You do not know where that salmon came from, what portion of the ship? A. No.

Q. Who was engaged in segregating this damaged salmon?

A. I saw the warehouse people looking after it, and there were a number of other parties around. I did not pay [196] attention to it. The warehouse people make a segregation of the salmon to get the different grades and brands, and I think the same crew that was doing that tried to get out this wet cargo.

Q. The wet cargo or damaged cargo was placed in piles on the dock? A. On the dock.

Q. And the salmon which was apparently undamaged was taken into the warehouse, is that correct?

A. Yes, sir.

Q. How many cases of damaged salmon was there on the dock?

A. I think somewhere close to 2,000 or a little over 2,000 cases of the different brands all told. I haven't that particular information.

Q. Now, Mr. Horner, at the time of this confer-

(Testimony of W. H. Horner.)

ence between Mr. West and Mr. Dawson and Mr. Burckhardt and the warehouseman, was this damaged salmon all segregated and loaded on the dock?

A. As far as they knew it was, yes.

Q. And the balance was in the warehouse?

A. Yes, sir.

Q. Did any of these parties at that time make an examination of the salmon in the warehouse?

A. I do not know.

Q. Is it not a fact that their conference, and the authority which was given to you at this conference, related solely to these two thousand or more damaged cases which were on the dock?

A. Not from the way I understood it. I was to put the cargo in condition and was constantly finding wet cases in the [197] stuff supposedly all right, that was part of the cargo.

Q. That was found later?

A. That was found while we were working on the dock salmon lots, some of the lots were already started and one brand had been sent to the warehouse.

Q. But these were found later. At the time of the conference the only damaged cargo which was apparent was the cargo of two thousand cases lying on the dock? A. Yes, sir.

Q. And these parties made no examination, that you know of, of the salmon that was in the warehouse?

A. No. I do not know of anybody examining it. My foreman found wet cases and called my atten-

(Testimony of W. H. Horner.)

tion to it and I looked around and found quite a number.

Q. We will take that up later. And you say that at that time they agreed that you should recondition this cargo?

A. That I should recondition the cargo.

Q. Did Mr. West agree that that should be done?

A. Mr. West said that I was agreeable to him, that is agreeable to him for me to do the work.

Q. For whose account was that work to be done, did you understand that?

A. No; that is the reason I had to wait some time for my money.

Q. Was it not the agreement that that damaged cargo should be put in condition without prejudice to the rights of any of the parties?

A. As far as I know, I do not know of anybody asking for any preference, if they had it would have done them no good. I don't give a damn for any man that lives, and if they don't like it they can beat it and get some one else to do it. [198]

Q. You misunderstand me. I mean without prejudice as to their liability or their rights.

A. I did not know who was to pay the bill. I thought it was up to the insurance company, but it was not, evidently. It would not have cost anybody a cent less or more whether it was the insurance people or not; I have one price.

Q. What I want to get at is whether any particular member at that conference told you to go

(Testimony of W. H. Horner.)

ahead and do the work and he personally would pay you?

A. No. Everybody said it was agreeable for me to do the work.

Q. And you went ahead and placed these two thousand cases in marketable condition and did whatever was necessary to them, and it was after that that your foreman found that some of the cases in the warehouse were also damaged by water?

A. He found one wet case on the side of the pile and called my attention to it and I looked over there and found a number of them and I told him to go ahead and overhaul the entire cargo.

Q. That was because you found a number of wet cases?

A. That was because I found a number of wet cases on the face of the pile that was supposed to be O. K. and ready for shipment, that is that was not damaged by the ship.

Q. How many wet cases did you find in addition to the 2,000 that were on the dock, segregated and placed on the dock?

A. We found something close to a thousand cases, more or less wet. Where the cases were only wet a trifle on the bottom but the water had gotten through and stained the labels, they had to be stripped and relabeled. [199]

Q. That would make 3,000 wet cases altogether, approximately? A. Yes, sir.

Q. That was out of the shipment of 29,000?

A. Yes, sir.

(Testimony of W. H. Horner.)

Q. And did you find any other damage—upon re-conditioning the cargo, did you find any other damage to that cargo that was in the warehouse?

A. We found more or less cases apparently dry that was gummed up with coal-dust, and we could not get it off without taking benzine and cleaning the cans and it would cut the enamel and cause the can to be relacquered. In some of these wet cases we found that we could take the labels off and wipe the cans and still relabel that same can and not have to lacquer it.

Q. Do you remember how many cases you found damaged with coal-dust?

A. No, I did not keep account of them.

Q. Can you give an approximate idea of it?

A. I can give you the total number of cases in each brand damaged both by water and coal-dust.

Q. I want to get at the number of cases that were damaged wholly or partially by coal-dust?

A. Now, that is something, unless you had someone right there with pencil and paper figuring up and checking the cases, you could not do it. We would find half of a case that would be dirty and other cases we would find four or six or eight cans all gummed up all along the side, the crack on the side of the case that was open, a piece rubbed off in loading, and the coal-dust would settle down and get in that way. [200]

Q. So that you could not give us any idea of the number of cases which showed no damage whatever from coal-dust?

(Testimony of W. H. Horner.)

A. Why, no, I would not make any estimate whatever on it. If I had known that they wanted it I could have kept track of the exact number and condition of each case the whole way through. I think you have a list there covering this; here is the record turned in by my foreman, showing the number of cases damaged and what was done.

Q. In order to get this in I will hand you this paper and ask you what that is.

A. That is a copy of the condition, of the number of cases and the brands purporting to be overhauled on that boat. Here is the brand. Here is what was done on the work, showing how many cases cleaned and lacquered, cleaned lacquered and relabeled.

Q. This C. & L. means cleaned and lacquered?

A. Yes, sir.

Q. C. L. & Rel.?

A. Cleaned, lacquered and relabeled.

Q. The others, shorts and swells, have nothing to do with this case. That was compiled by your foreman?

A. Yes, sir, here is the record he kept of it. Here is a list he took off his book as he cleaned up each lot and I took a record of it.

Q. That is correct, is it? A. Yes, sir.

Q. How many cases does that show which sustained any damage whatever?

A. There is about 4,088 cases. [201]

Q. Of the 4,088 cases there are 89 cases from the Chilkoot cannery of the M. R. brand that were cleaned and lacquered?

(Testimony of W. H. Horner.)

A. There was ninety cases. Eighty-nine cases cleaned and lacquered. Ninety cases overhauled; there was one swell, making ninety cases.

Q. These cases were not lacquered at the cannery, Mr. Horner?

A. They were not labeled; they came down unlabeled.

Q. Then you did not label them? A. No.

Q. Were they lacquered?

A. I labeled them five or six months later when they were sold. They had a certain amount of the same grade of fish, that is the Empire brand.

Mr. BOGLE.—I offer this statement in evidence.

Paper marked Claimant's Exhibit 1, filed and returned herewith.

Q. Mr. Horner, did you recondition the entire shipment of 29,657 cases?

A. Less 13 or some odd cases found short.

Q. Well, you have charged for 29,657 there, that must be the total amount. And I think you mentioned that you found some 4,000 more or less damaged. A. Yes.

Q. And what did you do to the balance of the cases which you found had no damage?

A. Reconditioned them, put on a new side or a new bottom wherever necessary to make a good parcel out of it and placed them in the warehouse ready for shipment. [202]

Q. Your overhauling charge then covers your examination of the entire shipment and placing it in marketable condition, does it not, and as to the cargo

(Testimony of W. H. Horner.)

which was damaged?

A. There is no fee for examination, any examination made, just the price of the time charged there for material and for the services of the crew.

Q. You have charged six cents a case for 29,657 cases overhauled? A. Yes.

Q. What is that six cents charge for?

A. That is for going over the cases and setting out the dirty cans and renewal of the cases and putting the stuff in good condition.

Q. And of these cases, you found some 25,500 cases that were undamaged? A. Undamaged.

Q. And your charge of six cents applies to this 25,000 as well as to the 4,088 cases that you found damaged?

A. Yes, that is segregating the lot, renewing and putting in shipping condition.

Q. When you had finished with the overhauling of the 25,000 and some odd cases were they in any better condition than when you started, the undamaged cases?

A. With the exception that the dirty cans had been removed otherwise the parcel was practically in the same condition that the previous shipments had been.

Q. Well, did you find dirty cans in all these 25,000 cases?

A. No. We would go along for sometimes fifty or seventy-five or a hundred cases and not find any, and then [203] would get in a mess, we would find a streak of them.

Q. These cases that were undamaged, did you do

(Testimony of W. H. Horner.)

anything to these cases besides examining them?

A. Opened them up and handled every can and threw out any dirty cans we could, or stained cans.

Q. You did not quite get the questions. Where there were no damaged cans to any case, you merely opened it up and examined the cans and then boxed it up again, did you? A. Yes, sir.

Q. And the charge of six cents is a general charge over the entire cargo? A. Over the entire cargo.

Q. So part of that charge at least is for salmon which was undamaged? A. Undamaged.

Q. And that part is the greater portion of it?

A. No. You could not tell out of that cargo without going through it.

Q. Is not that true of most any cargo which arrives from Alaska?

A. We make an examination and if we find anything wrong we go through the parcel, whatever brand we find the trouble in.

Q. If you found any damaged cases you would go through the entire shipment?

A. We would report it to the packer and if he wants to protect himself all right, we go through everything shipped. If he don't want to protect himself he can take chances with the trade. Where there is damage [204] by water the steamship company invites me to go over it and I go ahead and I never know the packer in the deal.

Q. Did not you find a lot of swells by going through this, overhauling this entire shipment?

A. There is a list and total number of swells. I

(Testimony of W. H. Horner.)

have not got that added up here, but I have the number in each lot.

Q. What did you do with the swells?

A. Fifty-eight cases. The packers were notified of the swelled cans and they were then sent to the city dump.

Q. What do you mean by a swelled can?

A. A swelled can is a can swelled at both ends until the side collapses. The cause of it might have been that the can was not cooked properly, or may be there was a leak or something that later on had been closed up by a piece of fish and there was gas formed. That can might not have been cooked long enough in the first place and that would cause it to swell.

Q. The only way to find these swelled cans is to overhaul the shipment, is it not? You found one or more cans to the case, the same as you found dirty cans?

A. You would find one can or possibly two cans and in many cases you would not find any.

Q. The only way to find these swelled cans—they are not marketable, are they? A. No.

Q. And the only way of finding these is to overhaul the shipment, is it not? A. It is. [205]

Q. By overhauling the shipment you found 58 cases of swelled cans, forty-eight cans to the case.

A. Yes, sir. But shipments running that small they never overhaul for swells. You have to get a good heavy per centage before they will overhaul a pack for swells.

Q. These swells, if the shipment is sent to the mar-

(Testimony of W. H. Horner.)

ket, come back as a claim against the packer?

A. The packer hears from them later on through the jobber and through the broker.

Q. Do you know how many cases were damaged by coal-dust and by rust?

A. No. I told you a moment ago that if I had known they wanted an exact record kept I could have put on an extra man with a pencil and paper and kept him all the time and found just the number of cans damaged by rust and so many damaged by coal-dust and so many by water.

Q. Could you give us any idea of the proportion damaged by water and the proportion damaged by coal-dust?

A. I should say close to three thousand cases damaged more or less by water, some wringing wet and some the labels stained part way up.

Q. And the balance were damaged by coal-dust?

A. Coal-dust and some of the wet ones had coal-dust also, quite a number, where the dust caked on the top and damaged.

Q. Were there more than 1500 cases damaged by coal-dust?

A. Well, that I am not prepared to say. I should think there was at least that much, if not a trifle more.

Q. Would that be approximately, in your opinion, the number of cases which showed any damage by coal-dust? [206]

A. I think that would be a fair estimate.

Q. Mr. Horner, if this shipment had been wet at

(Testimony of W. H. Horner.)

the time of delivery to the ship, in Alaska, loaded in the ship in a wet condition, would that have affected the condition of the shipment on arrival here?

A. That would depend entirely on how hard it was raining and as to whether they left the hatches uncovered and let the salmon get thoroughly soaked.

Q. I say if it was in a wet condition at the time of delivery to the ship, in Alaska, and was wet when loaded into the vessel, would the fact that it was wet at the time it was loaded in the hold, in any way affect or deteriorate the shipment during the voyage from Alaska to Seattle?

A. It might cause a few of the labels to open up, but being wet by frost or fresh water, would not cause it to rust in that length of time.

Q. Would it cause the boxes to swell?

A. No, it would cause the boxes to tighten up. These boxes were made early and dried out and have set all season and that case would be loosened up, and the dampness would cause the box to swell and clinch the nail that much harder.

Q. Then, if they were wet by fresh water that would not damage the box in any way?

A. Unless you soaked it and then put it in a damp place; where you get salt water of course it will damage the tin.

Q. The boxes I am speaking of.

A. The boxes, no. [207]

Q. Would not damage it?

A. You can take a box out and soak it in fresh water and let it dry, it will almost dry the cans in

(Testimony of W. H. Horner.)

there. But you take salt water on a box and any can that it touches will rust.

Q. How would it affect the box?

A. The box absorbs the salt and you cannot get rid of it, but fresh water evaporates and does not hurt the wood.

Q. Then this damage to the boxes was caused by salt water wetting them?

A. The damage to the boxes was caused by both fresh and salt water, or bilge water, whatever the case may be, but they were wet and these goods had to be shipped and we had to put them in condition and therefore they required new cases. I did not go around and chew pieces of the wood to see whether it was salt or fresh water.

Q. You said salt water damaged the boxes and fresh water did not.

A. I say if you take a box or lumber and let it soak in fresh water and then let it dry out you can use that and it will not hurt, but if you do the same thing with salt water there is more or less salt adheres to the box and when it gets a little damp it will come out and cut the lacquer and start the rust.

Q. To get at it in another way, Mr. Horner, referring to Libellant's Exhibit "A," the items of 2650 new cases—

A. Yes.

Q. What necessitated the making of 2650 new cases?

A. Cases stained more or less by water and coal-dust where it ran down over, and we replaced the wet cases with [208] new cases.

(Testimony of W. H. Horner.)

Q. Were these wet cases in such a condition that you were afraid they would swell or were anxious to get the shipment ready for market and dispose of the case?

A. It was a case of personal responsibility when finished. I would not take a chance of putting your goods or any body else's goods back in these wet cases, and shipping across the continent where they go into Montana and these northern states the goods will freeze solid, and where they do there is more or less dampness and rust starts.

Q. You do not know whether the damage to the cases was caused by fresh or salt water?

A. All I know is they came out of the ship wet.

Q. Does that include the tops and sides?

A. Tops and sides; some we took off the side and top and bottom. If it was a stained top or a stained bottom and we would use as much as we could of the old case to keep down the expense.

Q. That was because of the wood staining?

A. Yes, sir.

Q. You do not know whether that was from fresh or salt water? A. No, I do not.

Q. What was the condition of this shipment, Mr. Horner, when you finished with it?

A. The shipment was in A1 condition, prepared to go to any part of the world for sale by any jobber in foreign or domestic countries.

Q. It was in first-class marketable condition?

A. It was in first-class marketable condition.

(Testimony of W. H. Horner.)

Q. You placed them in first-class marketable condition at an expense of \$4,283.60? A. Yes, sir.

Q. In your opinion could there have been any further damage to that shipment after you had finished with it?

A. Not unless they shipped it by salt water and got the cases wet and then the cans rubbing in the salt water would cause rust to start on the cans, even though lacquered and would stain the labels.

Q. That would be because of some damage?

A. In transit.

Q. That had nothing to do with the shipment from Alaska to Seattle?

A. No. After the stuff had been put in first-class shape and had been reconditioned it would have to be redamaged. That entire cargo has been shipped and we have had time to hear from any and all parts of the country and we have the first complaint to come in. If any came in somebody would have to pay, and they all know that I stand behind my work and I would have to pay these claims.

Q. The entire shipment has been sold?

A. The entire shipment has been sold and shipped.

Q. And there has been no claim for any damage?

A. None whatsoever.

Q. Did you personally know when this shipment was sold?

A. It was sold along last spring, latter part of the winter or early spring, when salmon moved pretty good.

Q. You did not keep particularly in touch with

(Testimony of W. H. Horner.)

this, you [210] do not know exactly?

A. All I know is orders came down for different lots of the "Jeanie" cargo, out of that.

Q. Did you keep in touch with it, Mr. Horner?

A. In the warehouse I did, because I wanted to know who was getting it so that if trouble came I would know who got the "Jeanie" cargo and did not get something else. Get so many from Chomly and Chilkoot and Yes Bay.

Q. What I want to know is whether you personally knew when it was sold?

A. No, I did not know when it was sold, but I know it was sold during that spring. Last spring there was a good movement of salmon and this cargo was shipped at that time.

Q. Do you know how long after you finished re-conditioning it?

A. I should say ninety days or better before the last of it was shipped.

Q. Mr. Horner, did you try to make any estimate at the time you examined this cargo, this 2100 cases of damaged cargo, as to the percentage that was damaged by coal-dust? A. No.

Q. Do you remember telling Mr. West that you estimated there was about 15 per cent damaged by coal-dust?

A. No, I did not. I do not know that I had made anything like that, because on damaged cargo or damaged lot of goods I positively refuse to give any figures.

Q. I do not mean any binding figures.

(Testimony of W. H. Horner.)

A. I know, but I say I will not give figures, because I might get into a case that is not damaged much and I [211] would be handing them wrong figures, and again it might turn out worse than expected, and so it is straight time and material I charge for. I do not recollect making an estimate as to what was damaged by coal-dust.

Q. Mr. Horner, how did the coal-dust damage the cans?

A. The dampness in the hold of the ship and this coal-dust in there would cause it to stick and to stain the labels more or less. Also sticks on the tops of the cans and makes them dirty in case where they had gotten in.

Q. What did you have to do to place that cargo in condition that was damaged by coal-dust?

A. I had to wipe the tops of the cans and take the labels off and relabel them and we had to relacquer.

Q. Well, these cans which were lacquered were cans which had been damaged more or less by coal-dust? A. Coal-dust and rust.

Q. The rust might have been occasioned by salt water as well as by coal-dust?

A. Might have been, yes. The coal-dust will not start any rust. It is dampness that causes it to stick to the cans. We cleaned them off and used benzine and that will cut enamel as well as lacquer.

Q. Referring to the second item of your bill, exhibit "A." That is for salmon that was lacquered and relabeled? A. Yes, sir.

Q. That was occasioned by dampness and coal-

(Testimony of W. H. Horner.)

dust? A. And rust. That amounted to \$426.13.

Q. And the next item is for cases which were lacquered? [212] A. Lacquered only.

Q. How was that damage caused, by rust?

A. No, that was where we had to take the labels off, and we found more or less damage from the labels. We went to work and relacquered and put them in proper shape.

Q. And the next item, salmon which was cleaned?

A. That is the total amount of stuff that was cleaned. We found them damaged, coal-dust and rust. That was the total for cleaning them. The other is the price for the labeling and lacquering alone and relabeling and lacquering.

Q. Where you would lacquer and relabel you would also clean the can?

A. I would not clean a can unless it needed cleaning. I most assuredly would not lacquer a can that was rusty or dirty.

Q. I say where you lacquered a can, would you previous to lacquering clean the can?

A. Oh, sure.

Q. So that item of 4088 cases cleaned would be the total of all cases which were either relacquered or relabeled or cleaned? A. Yes, sir.

Q. And that would of necessity be all of the cases which you found to be in any way damaged?

A. Damaged condition, of the entire cargo.

Q. 4088 cases out of the 29,657 cases?

A. Yes. That 4088 is made up of the following, 3964 lacquered and relabeled, and 124 is just lacquered.

(Testimony of W. H. Horner.)

Q. Did you during this period of December and January [213] overhaul any other salmon shipments that came down from Alaska?

A. When finishing up the season's work, all the goods that were brought down unlabeled, they had to be labeled to go out for shipment. We did not have to recondition any other shipment at that time that I can recollect.

Q. Did you overhaul any other shipment for any other cannery during that fall?

A. I had a couple of small shipments, I think, for the Alaska Steamship Company, and a couple from the Pacific Coast Company, small items, though.

Q. You did not overhaul any large shipment?

A. This is the second large shipment that I have overhauled since I have been in the business.

Redirect Examination.

Q. (Mr. HANFORD.) To make it clear, Mr. Horner, I wish you would define the difference between "overhaul" and "recondition"?

A. Reconditioning is a case where the salmon has been damaged and you have to go through them to find out the nature of the damage and if the same can be put in marketable shape, very well and good. And if not then the damaged stuff is put aside. Overhauling a shipment, the salmon or the salmon pack, we generally term it labeling and overhauling, that is going through and labeling or stripping and relabeling, depending on what brand they want on the salmon to fix up the shipment and complete the orders, where there is no damage shown. If we

(Testimony of W. H. Horner.)

find any defective cans they are thrown aside. [214]

Q. Now, you have just stated that this "Jeanie" shipment was the second large consignment that you have overhauled since you have been in the business?

A. Of damaged.

Q. That is what I want to have understood.

A. The second large damaged cargo, when I say large I do not mean a few hundred cases. The other shipment was some 78 thousand cases on the steamship "Meteor." That was damaged by concentrates.

Q. Then comparing the relative number of consignments of Alaska salmon that are overhauled, as with the Puget Sound packs, the larger number of Alaska shipments are for the reasons you have stated, and not because of goods coming from there damaged?

A. No. It is due to the fact they do not know what their sales are on this brand or that brand. They have to bring a certain amount down unlabeled to save expense of relabeling to accommodate their trade.

Q. There is one question I want to ask you that was omitted on the original examination—

A. Well, I think I did overhaul one cargo this past September or October for Libby, McNeil & Libby, 1100 and some odd cases, charged to salt water, bilge water. They only got eight hundred cases. The rust from the salt water had eaten through; it was six weeks after it was out of the ship. Taken out early in September and it cost thirty-five cents a case just to clean the cans, besides the new material and

(Testimony of W. H. Horner.)

the new labels. The expense ran up so high that I turned the time to McNeil & Libby and let them pay the cost themselves [215] so they would get next to it. They are new men coming and it was a good way to teach them what it cost.

Q. Are you frequently employed to inspect shipments that are being sold and sent away, for the purpose of ascertaining the condition, prior to shipment? A. Yes, sir.

Q. Is fifty-eight cases, in a total of 29,000 an unusually large proportion of swells?

A. In the 1912 pack in sanitary cans, it was very small. I had just finished overhauling 13,000 cases and I threw out over five hundred cases from one packer. Of that there was 50 some odd cases alone of swells and 200 and some odd cases of cans that had collapsed and that stayed collapsed. They were going to be sent back to his cannery to be reconditioned.

Q. Would the fact that there were 58 cases of swells have prevented this entire cargo from being marketable so as to be shipped?

A. No, sir. They never overhaul a parcel of salmon for a percentage of swells unless it runs heavy.

Q. Now, one question I omitted. I want to get at, as near as we can, the time that this lot of salmon was detained here and kept from the market by reason of this conditioning. How long did it take you to complete the work?

A. I started on it the following day or the day afterwards after the conference on the dock. I did

(Testimony of W. H. Horner.)

not finish until some time in March.

Q. The date of the bill, is that approximately the date when you finished? [216]

A. That is about two days after the job was finished. I wanted a chance to check up and verify the figures before I put the bill in.

Q. (Mr. BOGLE.) Have you any note or memorandum showing the exact time you started, Mr. Horner, to recondition or overhaul this shipment, and the time you finished?

A. No. I would have to see my foreman. He keeps the time on the different jobs. I would have to see whether he had the records.

Mr. BOGLE.—Will you stipulate that he may get this and put it in the record later?

Mr. HANFORD.—I am willing. If you can find any memorandum of that kind, you can send it up here.

A. I do not usually keep the time book. When the people are paid off I throw it in the wastebasket and start a new one.

Mr. BOGLE.—Did you not state that it was customary to overhaul shipments where they were to be shipped for a foreign market?

A. We make examinations.

Q. Of what does the examination consist?

A. The examination consists of drawing samples, taking weights, and cutting for quality on shipments to foreign countries. There is a stipulation that one-half of one per cent is allowed for swells on the other side. Of course, if we find any swells to speak of, if

(Testimony of W. H. Horner.)

we find one per cent of swells here, the packer will overhaul for his own protection.

Q. As a matter of fact, Mr. Horner, the overhauling of this [217] entire shipment was for the protection and benefit of the packer, was it not?

A. Not necessarily, no.

Q. Did not you consider it was for the benefit, for his benefit, to recondition his entire shipment and overhaul it?

A. It was for the benefit of him in this way. He put it in condition so that he was not afraid to ship it, and there would be no come back; when he had his money it was his.

Q. It was a benefit to him?

A. It was a benefit to him, yes.

Q. Did you overhaul any other damaged shipments during last fall, 1913?

A. That is a question which the judge just asked, and I explained that this cargo was reconditioned. I have overhauled—

Q. You stated in answer to my question that you had not overhauled shipments? You mean that you did not overhaul any damaged shipments?

A. I corrected that a minute ago, I stated that I had Libby's. I had forgotten that.

Q. Did you overhaul any undamaged Alaska shipments during the fall and winter of 1912 and spring of 1913?

A. Only for the labeling, putting on proper labels necessary to go out to the trade.

Q. Nothing except for labeling?

(Testimony of W. H. Horner.)

A. That is all. I did not overhaul anything for swells or for conditions.

Q. Did not overhaul any shipments or rebox any shipments? [218]

A. Oh, I had a few small shipments, may be fifty or seventy-five cases, something of that kind at different times for the Alaska Steamship Company or the Pacific Coast, damaged by a little water, the breaking of a pipe or something like that.

Q. Any undamaged shipments is what I am trying to get at.

A. No, I did not overhaul any undamaged shipments for conditions, only overhauled for labeling.

Q. That is your regular business, is it not, Mr. Horner? A. Yes, sir.

Q. And you are fairly busy at it most of the time?

A. I think I had two days off in the last year and a half.

Q. Most of your work is on damage to small shipments?

A. No, sir, most of my work is looking after the general shipping of salmon, labeling, relabeling, stripping and marking and inspecting.

Q. In these shipments on the Alaska Steamship Company and the Pacific Coast, where there were a few cases damaged were these from very small shipments of salmon?

A. No, they were shipments running from four to ten or fifteen thousand cases.

Q. But approximately how many cases in these shipments did you overhaul or recondition?

(Testimony of W. H. Horner.)

A. Sometimes twenty-five or thirty, sometimes as high as seventy-five.

Q. In order to get at these twenty-five or thirty or seventy-five, would you overhaul the entire fifteen thousand cases?

A. No. I would receive notice from the Alaska Steamship Company or the Pacific Coast Company that they had so [219] many cases.

Q. You paid no attention to the balance of the shipment?

A. They had so many damaged cases to condition. I would say, where is the damaged stuff and I would put it in shape and that was the end of it.

Q. Not necessary to go through the entire fifteen thousand cases?

A. If I was on the dock and saw damaged stuff, I would pull out and call attention to protect the warehouse people, and make a notation and settle with the steamship company any damage in that parcel.

Q. You received no express authority from the owners of the "Jeanie" or the charterers of the "Jeanie," to overhaul this entire 29,000 cases, did you?

A. The only thing I received was the sanction of all parties that it was agreeable for me to overhaul the cargo.

Q. At a time that there was some 2,000 or 2200 cases damaged on the dock? A. Yes.

Q. And the balance was in the warehouse, reported good cases? Supposed to be good cases?

(Testimony of W. H. Horner.)

Q. (Mr. HANFORD.) Mr. Horner, when you were doing this work or when it was finished, were the cases which had been reconditioned segregated and kept separate from those which on inspection were found to be undamaged?

A. How is that, Judge?

Q. I want to know when your work was completed whether the cases which you reconditioned were mingled with those [220] which you had found undamaged, or whether they were segregated and kept separate from the balance.

A. They were kept separate. The cans we found were cased up and put in piles by themselves. The stuff was reconditioned and marked and put in separate piles, the different brands were kept separate, so that we could determine the piles and the different brands.

Q. Now, have you any knowledge with respect to the disposition of this lot of salmon, as to whether those which were reconditioned were sold as first-class goods the same as the undamaged, or differently?

A. No, sir, they were all sold as first-class goods, at the market price. No exception made whatsoever against them.

Q. In what way did you obtain that information?

A. By seeing some of the orders or sales sheets. I happened to have a desk in the office of the brokerage firm that handles these goods, and have been there for nine years, Kelley-Clark Company.

Q. If you kept the reconditioned salmon separate

(Testimony of W. H. Horner.)

could not you give us some idea of the exact number of cases that were reconditioned, out of the ones you found good, or is that the 4088?

A. Here is a typewritten list. That sheet shows how many of each brand, there is a complete list. The difference between the original amount and this is the amount we put back as good as they were.

Q. In using the word recondition, you refer to the salmon your bill shows were overhauled? [221]

A. Yes, we overhauled them to find out what the damage was in order to get them ready for shipment by the broker to the trade.

(Witness excused.) [222]

Seattle, Wash., June 30, 1914.

Continuation of proceedings pursuant to agreement of proctors.

Present: Judge C. H. HANFORD and Mr.
J. A. KERR (of Messrs. KERR &
McCORD), Proctors for Libelant,
Mr. LAWRENCE BOGLE (of Messrs.
BOGLE, GRAVES, MERRITT &
BOGLE), Proctor for Respondent and
Claimant.

Claimant's Testimony.

[Testimony of P. H. Karbbe, for Claimant.]

P. H. KARBBE, produced as a witness on behalf of claimant, having been first duly sworn, testified as follows:

Q. (Mr. BOGLE.) State your name, age and residence?

A. P. H. Karbbe, sir.

(Testimony of P. H. Karbbe.)

Q. And age? A. Forty-five years old.

Q. And you reside in Seattle? A. Yes.

Q. What is your business?

A. I follow the sea for a living.

Q. How long have you been a seafaring man?

A. Since 1882.

Q. You hold a master's license, do you?

A. Yes, sir.

Q. How long have you held that license?

A. I have held that since 1898.

Q. Were you the master of the steamship "Jeanie" on her [223] voyage to Alaska and return, commencing somewhere about December, 1912, and ending January 8th, 1913? A. Yes, sir.

Q. Captain, on your voyage from Seattle to Alaska, I wish you would state in a general way what cargo you had aboard.

A. Well, sir, we had coal, dynamite, oil and general merchandise.

Q. What was the nature of this coal, sacked or in bulk? A. No, in bulk.

Q. Where was this coal loaded?

A. It was loaded at Nanaimo, that is, in—well, just above Nanaimo.

Q. Well, I mean what portion of the "Jeanie?"

A. It was loaded in all the hatches we had, that is, 1, 2 and 3.

Q. And what portions of the ship itself, on what decks?

A. Well, that is in the lower hold and part 'tween deck in No. 1 and 2.

(Testimony of P. H. Karbbe.)

Q. No. 1 and 2; those are forward holds, are they?

A. Yes, sir.

Q. Is the "Jeanie" an iron or wooden vessel?

A. She is a wood vessel.

Q. Or was she, rather. How long had you been on the "Jeanie" prior to this voyage?

A. I had been on the "Jeanie" since—I joined her sometime in June; I could not say.

Q. June, 1912? A. Yes.

Q. What condition was the "Jeanie" in at the time she started [224] on her voyage at this time?

A. Good condition, as far as I know.

Q. Do you know when she was last on drydock?

A. She was on drydock in July some time, I think

Q. 1912? A. 1912.

Q. Do you know what repairs were made on her at that time?

A. No, sir, I don't. She was fixed up as near as they could; I believe she was calked and—

Q. (Interrupting.) After she was on drydock in July, do you know whether or not her decks were calked or was there any work done on her?

A. Yes, in August or September, I think it was in September they sent two calkers over to Tacoma to fill her soft spots and then calk them; but I could not say what month.

Q. August or September, 1912, you think?

A. Yes.

Q. Prior to this voyage? A. Prior, yes, sir.

Q. Captain, what was your first port of call after leaving Seattle on your north bound voyage?

(Testimony of P. H. Karbbe.)

A. Well, I sailed from the dynamite place up here.

Q. I see. A. What do you call it?

Q. Dupont?

A. Dupont. I sailed from here to Dupont and from Dupont to Ketchikan.

Q. Well, now, captain, on your voyage from Seattle to Ketchikan, what kind of weather did you find?

A. We had bad weather going north. I had to heave to eight [225] hours on Charlotte Sound, to save the deckload.

Q. Was the "Jeanie" taking any water at that time, on the northbound voyage?

A. She was taking some water all the time when I was with her; I never saw any difference.

Q. She always takes a little water, does she?

A. Yes.

Q. Was the water in such quantities that her pumps were or were not able to handle it?

A. No, sir, not while I was aboard her.

Q. You mean that her pumps could handle it?

A. Yes, sir, easy.

Q. Captain, when you arrived what cargo did you discharge there?

A. Just discharged a little general merchandise.

Q. And from there you proceeded north?

A. No, sir, then I went to Bonanza Cove; then up to that Jap place, and then I went to Wrangell—

Q. (Interrupting.) Now, going through Wrangell, did you at any time touch bottom?

A. Yes, sir.

(Testimony of P. H. Karbbe.)

Q. I wish you would just state the circumstances in connection with that?

A. Well, I got by what they call Finger Point, and looked all right, and in a few minutes she started in—hit a snowstorm, and I slowed her down and stopped her and we laid still. I told the man, I says, "Throw your lead overboard." It was muddy bottom. And we got some three fathom of water, and I let go of the anchor and stayed until morning.
[226]

Q. What is the width of the channel at that place?

A. Well, it is about—perhaps it is—perhaps it is 200 feet.

Q. Do you remember what time of day it was that you let go your anchor in Wrangell Narrows?

A. Somewhere around five o'clock, sir; I could not say what time; somewhere around five.

Q. And were you at that time resting on the bottom?

A. No, sir, she just—you know she just dragged that way, but I didn't know what side I was on of the channel.

Q. When did she touch bottom?

A. She never touched bottom—she never touched bottom until I let go of the anchor and the tide dropped her aft, then she touched bottom, I should judge about—well, about somewhere after five. Of course this was loose mud, you know, and that would kind of drift away with the tide, you know, until she got hold solid. I should judge somewhere about half-past five.

(Testimony of P. H. Karbbe.)

Q. Then you remained there until the next morning?
A. Yes, sir.

Q. And how did you get out?

A. Well, I ran a kedge anchor out that night and pulled her taut so as to be ready the next morning; then I sent a boat out to hunt up the buoy—there is a black buoy on Green Point—and put a light on there so that I could see the next morning what to do.

Q. Captain, what was the nature of the bottom of the place you were?
A. Muddy bottom.

Q. Did you get off some time the next morning?

A. Yes, sir. [227]

Q. And proceed on your voyage?
A. Yes, sir.

Q. When did you arrive at Juneau? That was your next stop, wasn't it?

A. I think we arrived there somewhere—I could not say for sure, but I arrived there about the 16th—15th or 16th.

Q. Of December?
A. December, yes.

Q. Did you make any report of the fact that you had been stranded?

A. Yes, sir, I reported to the inspector, George Whitney.

Q. Do you know whether or not he made any examination of the "Jeanie"?

A. Well, sir, I believe he was down there. There was no inspection that he could make. Of course the ship was seaworthy. She was as good as she was when she left Seattle.

Q. After you reported this fact to him, did you

(Testimony of P. H. Karbbe.)

receive any authority from him?

A. He told me, "That is all right, go ahead."

Q. Captain, from the time you got off this muddy bottom in Wrangell, up to the time that you arrived at Juneau, did you sound your pumps or take any precautions to find out whether any damage had been done or whether or not she was leaking?

A. Yes, sir, I instructed the mate to sound her bilges, you know. The report came to me that she was just the same as she was before—no water—that is, only usual of course. [228]

Q. What cargo did you unload at Juneau?

A. Well, I had some general merchandise, hay and stuff, and then I had coal. I forget how many tons, it is quite a while ago.

Q. What was your next port of call, Captain?

A. From Juneau we went to Chilkoot.

Q. Now, Captain, where did you get your instructions to go to Chilkoot, before you left Seattle?

A. I had no instructions; I used my own judgment in the matter.

Q. I mean who instructed you to go to Chilkoot?

A. Myself. I had instructions to go to Chilkoot, Yes Bay and Chomly for 32,000 cases of salmon.

Q. That is what I mean, Captain. When did you receive those instructions?

A. In Juneau, by telephone.

Q. Now, Captain, when you arrived at Chilkoot, did you take some salmon aboard there?

A. Yes, sir, 10,000 cases more or less; I forget now how many it was.

(Testimony of P. H. Karbbe.)

Q. Where did you load that salmon on the "Jeanie"? A. Loaded it in No. 1 hold, sir.

Q. Where is No. 1 hold on the "Jeanie"?

A. That is the forward end of her.

Q. Had any coal been previously loaded in No. 1 hold? A. Yes, sir.

Q. Where was that coal unloaded?

A. In Juneau.

Q. And after the coal was unloaded, what did you do with reference to cleaning out those holds? [229]

A. Well, sir, there was every precaution taken. I told the mate to sweep up forward two or three times, because the dust flies around, and then sweep again and you get a little more.

Q. Did you have charge of loading the cargo?

A. No, sir.

Q. Do you know how it was dunnaged?

A. No, only I gave instructions how to dunnage it.

Q. What instructions?

A. Well, I told the mate to put four inches of dunnage in No. 1 hold.

Mr. KERR.—Don't tell what you told the mate.

Mr. BOGLE.—I think that is probably not material. I am going to call the mate, anyway, Mr. Kerr.

Q. (Mr. BOGLE.) You have no actual knowledge as to how this cargo was dunnaged?

A. No, that I have not.

Q. When did you leave Chilkoot—what was the next port of call?

A. The next port of call was Gypsum.

(Testimony of P. H. Karbbe.)

Q. On the voyage from Chilkoot to Gypsum, what was the nature of the weather you encountered?

A. Well, sir, it was nasty, dirty weather; southeast, strong, blowing about thirty miles an hour, I should judge.

Q. Did you take any seas over the vessel-

A. No, sir; might a little spray once in a while.

Q. Did you discharge any cargo at Gypsum?

A. No, sir.

Q. Why was that, Captain?

A. Well, there was a barge. I came there eleven o'clock [230] at night and it was dark and snow squall, southeast or southwest snow squalls, and there was a barge alongside of the dock, and I laid there until in the morning, in daylight, about 7:30 or eight o'clock I steamed in and I asked him if he would let me lay alongside of the barge and discharge what coal I had for there. He says, "No, you have to tow the barge out." Well, I didn't have the power in the ship to tow any barge out in that weather.

Q. So you did not discharge any cargo at Gypsum? A. No.

Q. What was your next port?

A. I laid until eleven o'clock, thinking that the weather would moderate and I would go in and do that work, but it didn't moderate, so I proceeded to Sitka.

Q. What was the nature of the weather encountered on the way from Gypsum to Sitka?

A. It was not very bad. It was, perhaps, twenty-

(Testimony of P. H. Karbbe.)

five or thirty-mile weather—heavy snow squalls, though, snowing heavy.

Q. No worse than the weather you usually expect to encounter in that time of the year? A. Oh, no.

Q. What cargo did you discharge at Sitka?

A. I discharged coal.

Q. Do you remember where that coal was taken from?

A. Yes, sir, it was taken, I think, from No. 2—No. 1, No. 2 and I think No. 3, I am not positive.

Q. Captain, when this coal was being discharged, did you take any precautions to protect the salmon that was on board? [231]

A. Yes, sir, we tacked up all around—tacked up canvas; we put canvas up and then put battens on, you know, and tacked the canvas up against the sides, so that the coal-dust could not get in. Of course, it will more or less, anyway.

Q. Where did you proceed after leaving Sitka?

A. I went to Sulzer—I tried to go to Sulzer, but it was blowing so hard I could not make it; I had to turn back.

Q. What was the nature of the weather you encountered on the voyage from Sitka to Sulzer?

A. Southeast gale with a strong southwest swell.

Q. And what was the strength of the wind?

A. Well, I should judge about forty miles an hour.

Q. (Mr. KERR.) How much?

A. Forty miles an hour.

Q. (Mr. BOGLE.) How was the sea, Captain?

A. Oh, the sea was enormous, these cross-seas,

(Testimony of P. H. Karbbe.)

across from the southeast, southwest and westerly swells, they just came up and they just—oh, I never saw anything like it.

Q. How did the vessel act in that sea?

A. She acted good, but no vessel could act good in a sea like that and cross it all, you know.

Q. Did she roll any?

A. Oh, God! roll! yes. I never saw any worse in all my work at sea.

Q. Did she take any water over her deck?

A. Yes, she took it clean all over.

Q. How long were you in that sea trying to make Sulzer?

A. Well, I left Sitka in the morning and I turned around eleven o'clock that night to go inside—no, about ten [232] o'clock, about half-past nine, ten o'clock. I got inside at eleven o'clock, somewhere around eleven.

Q. Were you in this sea during all that time?

A. Yes, sir. No, not in this—that is, it was not as bad, you know, during the day, but towards evening, you know, it was worse.

Q. You say you went inside? A. Yes, sir.

Q. What was the purpose of that, Captain?

A. Well, I tried to save the ship and cargo.

Q. Did you make any further attempt to get to Sulzer?

A. Yes, I went inside, started inside for Clarence Strait, but that was the day after.

Q. Did you finally reach Sulzer?

A. No, sir, I had to turn back—a forty-mile gale,

(Testimony of P. H. Karbbe.)

I guess, and the ship would not make no headway, and I knew if I ever started for there I could not do nothing with her, so I turned and went to Ketchikan.

Q. How long were you in this sea, Captain, the second time?

A. Well, I was not in this sea long; I only tried about three hours on that.

Q. Was the ship taking any water during those three hours, Captain?

A. Yes, she was taking quite a little.

Q. And how was she acting—

A. (Interrupting.) I mean over—I am not speaking about what she leaks—

Q. (Interrupting.) Over her deck? A. Yes.

Q. Now, how did she act in this sea, Captain? [233]

A. She acted all right; she was a good sea boat; she was a good ship.

Q. I mean as to rolling?

A. No, there was no roll; right head to, you know.

Q. A head sea? A. A head sea, yes.

Q. Then where did you go?

A. I went to Ketchikan and sold the coal there.

Q. Did you discharge the balance of your coal at Ketchikan? A. Yes, sir.

Q. Captain, during this sea that you encountered trying to reach Sulzer, was that the ordinary sea that you would expect to encounter at that time of the year?

A. Oh, no, sir. No, that was beyond that. I

(Testimony of P. H. Karbbe.)

would not have gone that way.

Q. The "Jeanie" being a wooden vessel, would she strain any in a sea of that kind?

A. Oh, yes. Oh God! yes. Any ship would; an iron ship would.

Q. During that time was the "Jeanie" taking any more water—I don't mean over her decks, but in the vessel herself?

A. No, sir; that is, I never was notified—no more than what she usually did in all the time I was in her.

Q. Her pumps were—

A. (Interrupting.) Oh, you mean the time when—the night of the heavy gale when I turned around?

Q. The night you were trying to reach Sulzer?

A. Yes, of course, with that heavy straining she took more water.

Q. Were you operating the pumps all the time, Captain? [234] A. Yes, sir.

Q. Were you able to take care of the water all right? A. Yes, sir, we pumped every hour.

Q. When you arrived at Ketchikan and discharged your coal, where did you proceed next?

A. We went to Yes Bay. Well, we stayed there that night and cleaned the holds, you know. After I got the coal discharged, why, we stayed and we worked all night cleaning the holds and fixing up for salmon. We were going to get some salmon at Yes Bay.

Q. What did you do with reference to cleaning the holds?

(Testimony of P. H. Karbbe.)

A. Well, we swept them thoroughly and then swept them again, swept them two or three times—always when we have coal. The dust floats around and then it settles again and then when you sweep it again you get a little more of it.

Q. Then you proceeded to Yes Bay, did you?

A. Yes, sir.

Q. Took on how much salmon there, Captain?

A. Well, I could not say. I think we took on—

Q. (Interrupting.) Just approximately? I think the record admits the amount.

A. Fifteen thousand or something, or thirteen thousand something.

Q. Then where did you go?

A. Then we went from there into Bonanza Cove.

Q. And afterwards to Chomley?

A. Afterwards to Chomley.

Q. Do you remember where the salmon from Yes Bay and Chomley was loaded aboard the ship?

A. No. [235]

Q. You didn't have to do with that?

A. Well, I had to do with it, but then I went to bed.

Q. The duty of stowing the cargo was with the first officer—the officer's duty? A. Yes, it was.

Q. Then you returned to Ketchikan and sailed on the southbound voyage? A. Yes, sir.

Q. Do you remember when you left Ketchikan?

A. I left Ketchikan I think on the 3d of January; I am not sure; I would not say this for positive fact; it is a long time ago.

(Testimony of P. H. Karbbe.)

Q. Yes. Captain, after leaving Ketchikan, what weather did you encounter on your southbound voyage? A. It was all bad weather, sir, and snow.

Q. Was it the weather that you would, from your experience, anticipate encountering at that time of the year? A. No, sir; I never saw it before.

Q. Where did you strike the worst of the weather, Captain?

A. After I got by—after I got through Seymour Narrows, that is the worst part of it.

Q. What was the nature of the weather you struck there?

A. Well, I struck a—oh, I should judge about a sixty-mile gale, with snow, and we went through the Narrows somewhere around 3:30 I think in the afternoon and at eleven o'clock next day I had made about thirty miles, going full speed.

Q. From eleven o'clock one day until—

A. (Interrupting.) No—

Q. Three o'clock one day until eleven the next?

[236] A. Yes.

Q. How was the sea during this heavy weather?

A. Oh, *it an* awful sea, terrible sea.

Q. Did the vessel roll or strain any?

A. Well, she strained all the time, naturally. She had a big, heavy load, you know.

Q. Was she taking any water over her decks?

A. Yes, she was filling her decks all the time.

Q. During what portion of the time was she taking water?

A. Well, she was taking water—you mean from

(Testimony of P. H. Karbbe.)

the time we left Seymour Narrows?

Q. Yes.

A. All the time, that is, from Cape Mudge to about the—well, about say—we will say eight o'clock the next morning.

Q. How much water were you taking over your decks—a small amount?

A. No, sir, a large amount.

Q. Were the big seas shipped right over your—

A. (Interrupting.) Yes, quite big seas.

Q. Did you have any trouble handling your ship during this weather?

A. No. Well, she just had steerage way, that is all; I could just steer her, that is all.

Q. Do you remember when you arrived in Seattle?

A. I think it was on the 8th; I am not sure.

Q. What is your usual voyage on the "Jeanie" from Ketchikan to Seattle?

A. About seventy-six to eighty hours.

Q. This was an unusually long voyage, then?

[237] A. Yes, sir.

Q. What was the cause of that?

A. Well, it was the heavy weather.

Q. During this heavy weather which you encountered coming down, were you able to take care of the water with your pumps? A. Yes, sir.

Q. Was she taking an unusual amount of water?

A. Well, she was taking more, you know, than she used to, and then the pump broke down, but we fixed it up so that we could work one; that is all I wanted—all I needed.

(Testimony of P. H. Karbbe.)

Q. Was your vessel in any danger of foundering at any time? A. No, sir.

Q. Do you know approximately how long your was in this heavy weather?

A. Well, it was all heavy weather, all heavy weather.

Q. Five days?

A. Well, you know it was all pretty nasty, it was blowing strong, but she was not taking any seas or anything. The worst weather we had was from Cape Mudge and up to say eight o'clock that morning. I forget what time we were opposite Cape Mudge, but it says in the report.

Q. Captain, how long have you been engaged in making voyages to and from Alaska?

A. Since 1897.

Q. Was this voyage of the "Jeanie" an unusually rough voyage?

A. Yes, sir, I never seen the beat of it.

Q. During that time? [238] A. No, sir.

Q. Were you on watch when the vessel arrived in Seattle? A. Yes, sir; I am always on watch.

Q. I mean were you on deck at the time they started to unload the cargo?

A. No, sir. I went home. I was sick.

Q. Do you know anything about the damage to this cargo?

A. No, sir, nothing was ever reported to me, not a thing.

Q. Nothing was ever reported to you?

A. No, sir, nothing.

(Testimony of P. H. Karbbe.)

Q. Was any claim ever made against you or filed with you as master of this vessel?

A. No, sir, nothing was said to me at all, not a thing.

Q. Captain, do you know how these hatches were secured, covered?

A. Yes, sir; they were calked and three tarpaulins on each hatch.

Q. When were they calked?

A. They were calked in Chomley, that is, when we finished they were calked, when we went to sea.

Q. Was the forward hatch secured in the same way when you left Chilkoot? A. Yes, sir.

Q. Have you had any experience in loading cargo on Alaska vessels? A. Yes, sir, quite a little.

Q. In your opinion, captain, were these hatches properly secured? A. Yes, sir.

Q. (Continuing.) For the weather expected to be encountered [239] at that time of year?

A. Yes, sir; could not be no better.

Q. Captain, in your experience in navigating Alaska waters, I will ask you whether it is unusual for a vessel to lay in Wrangell Narrows and touch bottom there? A. Beg pardon?

Q. Whether it is anything unusual for a vessel to touch bottom in Wrangell Narrows?

A. No, sir. I have touched bottom lots of times in Wrangell Narrows.

Q. Did you ever sustain any damage?

A. Yes. Not at Green Point, though.

Q. You touched what kind of bottom when you sustained damage?

(Testimony of P. H. Karbbe.)

A. Well, we touched rock then.

Q. Rock? A. Yes.

Q. You say this was mud bottom where you touched? A. Yes.

Q. Did you ever sustain damage from touching there when there was mud bottom?

A. Well, I never touched at Green Point before.

Q. Are you sure that was mud bottom there?

A. Yes. The ship sunk down over four feet in the mud.

Mr. BOGLE.—I do not think it is proper for me to offer the protest as a part of our case. If there is no objection, I will offer it. If there is, of course, I will have to withdraw it. Merely for the purpose of showing the entries in the log-book.

Mr. KERR.—Well, the protest is not complete anyway. I [240] don't want to—

Mr. BOGLE. (Interrupting.) The only purpose of it is showing the entries in the log-book.

Mr. KERR.—Well, wait until I finish my cross-examination before you ask him.

Mr. BOGLE.—All right.

Cross-examination.

Q. (Mr. KERR.) Captain, how much coal did you have for the various ports in Alaska?

A. Beg pardon?

(Question read.)

A. Oh, that is—I can't tell you that.

Q. Approximately how many tons?

A. I think I had between five and six hundred tons, I am not sure. That is beyond me, anyway.

(Testimony of P. H. Karbbe.)

Q. The "Jennie" has a small 'tween decks?

A. No, sir. That is the upper deck we call it. She has a large 'tween deck.

Q. She has what?

A. A large 'tween deck, and then she has a little bit of a deck there.

Q. That is the orlop deck, isn't it?

A. No, the 'tween deck would be the orlop deck, and this other deck is just about the height of this table from the floor.

Q. For what points did you have coal?

A. We had coal for Juneau and Gypsum, Sulzer and Sitka. [241]

Q. You did not deliver any coal at Gypsum or Sulzer?
A. No, sir.

Q. Neither of those places?
A. No, sir.

Q. You did deliver coal at Sitka and you took that out of the forward hatch?

A. Well, sir, I think I took it out of—yes, it is No. 1 or No. 2 and No. 3 also I think.

Q. Did you take it all out of the forward hatch at Gypsum—or at Sitka?

A. No, sir, I don't think I did; no, sir.

Q. You don't think you did. Then you did not unload any more coal until you got back to Ketchikan?
A. No, sir.

Q. Then you put the salmon that you took over at Chilkoot in the forward hatch with the coal?

A. No, sir, not with the coal at all. It was perhaps the width of this room from the coal.

Q. Well, you put it in the forward hold then?

(Testimony of P. H. Karbbe.)

A. Yes.

Q. Where the coal was? A. Yes, sir.

Q. In bulk? A. Yes, sir.

Q. Were you down in the forward hold after they took whatever coal was taken out of it—

A. (Interrupting.) No, sir.

Q. Wait until I finish the question, Captain. After whatever coal was taken out of it at Sitka before you arrived at Chilkoot— [242]

A. (Interrupting.) Well—

Q. You did not go down in there at all, that was not any of your business, was it?

A. It is my business, you know, but I was not down there.

Q. You were not down there at all? A. No, sir.

Q. Were you down in the hold while the vessel laid at Chilkoot? A. No, sir.

Q. That was not any of your business to go down there?

A. Yes, it is my business, but I was not down there.

Q. You were not down. When was the coal taken out of the forward hold? A. In Juneau.

Q. On your way down? A. On my way up.

Q. When was the balance of it taken out? Not until you arrived back at Ketchikan, was it?

A. No, not until I arrived back at Ketchikan.

Q. Now, if all the boxes of the salmon that were loaded at Chilkoot were found full of coal-dust when they arrived here at the dock, to such an extent that they all had to be overhauled, they got that in the hold of your vessel, didn't they? A. Yes, sir.

(Testimony of P. H. Karbbe.)

Mr. BOGLE.—I object to that as not based upon testimony in this case.

Q. (Mr. KERR.) That is where they got it—in the hold of that vessel?

A. They must have. [243]

Q. They must have gotten it that way. And if a lot of this salmon that was brought down on that voyage was discolored, the labels all discolored and the cans all rusty from water, they got the water from the hold of that vessel, didn't they?

A. Well, they could not have got it anywhere else.

Q. They could not have gotten it anywhere else. Now, I understand you had no particular stress of weather until you arrived at Chilkoot?

A. No, sir, not until we arrived in Chilkoot. Yes, I had eight hours hove to in stress of weather—when we hove the ship to.

Q. What time did you arrive at Wrangell Narrows, going up?

A. I think I arrived there about the 12th or 13th.

Q. Of December? A. Of December.

Q. What time of the day did you enter Wrangell Narrows?

A. I think I entered there somewhere around three o'clock. I am not sure.

Q. I want you to be just as sure now as you can.

A. I am not sure. Then I won't say nothing, because I ain't sure.

Q. Your best judgment is that you entered Wrangell Narrows about three o'clock on what date?

A. Well, I could not tell you the date, either.

(Testimony of P. H. Karbbe.)

Q. Well, you said a minute ago you thought it was the 13th, didn't you?

A. Well, I think so, yes; I am not positive.

Q. That is three o'clock in the afternoon. Is that right?

A. That is right, somewhere around there, I could not say [244] which.

Q. Of December 13th. What time did you go to anchor on December 13th?

A. Well, I went to anchor somewhere around five o'clock; I could not say.

Q. Five P. M. of the 13th in Wrangell Narrows; at what point? A. Green Point.

Q. What point? A. Green Point—Green.

Q. Gray? A. Yes—Green.

Q. How far up the Narrows is Green Point?

A. Well, it is about twelve miles, I should judge—twelve or thirteen miles.

Q. You came to anchor because you struck the bottom, did you not?

A. No, sir, I didn't strike bottom.

Q. What did you go to anchor for?

A. Because I was afraid of drifting on the bottom and may injure the ship.

Q. Which way was the tide running?

A. The tide at that time was about—a little after slack water; there was hardly any tide.

Q. Low or high? A. High.

Q. Why did you stop in the Narrows at slack water, high water?

A. Because it was snowing and dark; I could not

(Testimony of P. H. Karbbe.)

see where I was at.

Q. What time did you get off the next day? [245]

A. Somewhere around five o'clock in the morning; I can't tell exactly, but that is—

Q. (Interrupting.) What was the stage of the tide then?

A. High water, sir, the same tide as it was—

Q. (Interrupting.) Five A. M. on the 14th?

A. Yes, sir.

Q. Did you have a long run-in of the tide that night, or short?

A. Well, that I could not tell you.

Q. You don't know whether that was the long run-out during the night or not? A. No, sir, I don't.

Q. What is your best judgment on it?

A. Well, it is a short run-out.

Q. You think it was a short run-out?

A. It was small tides.

Q. How much tide, in your judgment?

A. Well, it was I think eight foot six, was the tide in the almanac.

Q. And you struck at high water, so that the tide went out eight feet six inches?

A. No, about four feet or like that. Perhaps it was four feet low water slack.

Q. Do you think the fall would be about four feet?

A. Well, it would be over that, you see, it would be about twelve feet, but then what I mean it would be four foot low water slack.

Q. Well, if you were in there at high water, what would be the fall—the extreme fall of the tide during that night? [246]

(Testimony of P. H. Karbbe.)

A. Well, I should judge—well, say eight feet.

Q. Eight feet. How much water does the “Jeanie” draw? A. She drew twenty foot six, I think.

Q. There were about three fathoms of water when you dropped your anchor?

A. Yes, somewhere around there.

Q. That is 18 feet? A. Yes.

Q. No wonder she got four feet in the mud, when the tide dropped eight feet, was there?

A. No, of course there was no wonder.

Q. There would only be 12 feet of water where she was lying and she drew 20 feet, didn't she?

A. Yes.

Q. The most of Wrangell Narrows is rocky, isn't it? A. You bet.

Q. From one end to the other?

A. Yes. Not one end to the other; there is lots of rocky bottom, though.

Q. Well, it is nearly all rock all the way, and crooked? A. Yes, and crooked.

Q. The channel is rocky almost every foot of the way, isn't it? A. Oh, no, no.

Q. What?

A. There is lots of muddy bottom in Wrangell Narrows.

Q. Where is Green Point from where the old salt-ery used to be on the Narrows, on the right hand side as you go up, where the old wreck laid for so long?

A. Well, it is about—oh, I should judge about eight miles [247] from there.

Q. Below or above? A. About six miles.

(Testimony of P. H. Karbbe.)

Q. Below? A. Above.

Q. Above, above there. It was above there?

A. You remember where Tongas cannery is?

Q. Yes, I remember where the Tongas cannery is.

A. It is about a mile this side of Tongas cannery.

Q. Now, how wide is the Narrows at that point?

A. Well, I could not tell you that. We will say—
I will give you 200 feet.

Q. 200 feet; at high tide? A. At high tide.

Q. How wide at low tide?

A. Oh, well, I don't know about low tide.

Q. How?

A. That is beyond me, I could not tell you that.

Q. Is the channel there straight or crooked?

A. It is pretty straight.

Q. And how far were you from Petersburg?

A. Well, I don't know—oh, I should judge about
eight miles.

Q. You had in the vessel, when she lay there for
from five o'clock—or three o'clock on the 13th until
5 A. M. of the 14th, at least 600 tons of coal, and how
many tons of other freight?

A. Oh, we had some dynamite and we had pil and
we had all kinds of stuff, you know.

Q. A full cargo? [248]

A. Full cargo.

Q. What is her tonnage?

A. Well, her tonnage is somewhere around 800,
somewhere about 800 tons.

Q. Do you know how many years old the "Jeanie"
was?

(Testimony of P. H. Karbbe.)

A. Somewhere around twenty-one or twenty-two years, I guess.

Q. Now, Captain, you testified that the "Jeanie" was on the drydock in July. Do you know anything about that personally? Did you see her on any drydock? A. Yes, sir.

Q. You saw her there yourself? A. Yes, sir.

Q. Did you see her being calked?

A. No, sir.

Mr. BOGLE.—I don't think he testified she was calked then. I just asked him if she was on the drydock.

Mr. KERR.—I think he testified. He said she was calked in September.

Q. (Mr. Kerr.) Did you see her calked?

A. I saw her decks calked, yes, sir, somewhere around September—part of her decks.

Q. You saw two calkers working on her decks in September?

A. Yes. Well, I don't say whether it was August or September.

Q. Well, August or September. Where was that, Captain?

A. That was going from here to Tacoma and back and while we were in Seattle and also while we were laying in Tacoma.

Q. How long did these two men work on the decks of the "Jeanie"? [249]

A. I don't know about that part of it.

Q. How long did you know of their working on the decks of the "Jeanie" calking?

(Testimony of P. H. Karbbe.)

A. I could not say.

Q. How? A. I don't know.

Q. How long did you know of their working on the decks—two men?

A. I don't know. I was pilot, you know. I went ashore, I went home.

Q. Well, how long did that trip consume when you say these two men were aboard calking the decks?

A. Oh, I should judge about three or four days.

Q. Three or four days. Two men could not calk the decks of the "Jeanie" in three or four days?

A. No, they just calked the soft spots, you know, just the soft spots.

Q. You don't think that this vessel, with a full cargo, drawing 20 odd feet of water and lying in 12 feet of water a part of a night, would open up any of her seams, do you? A. No, sir.

Q. Her deck seams? A. No, not a thing.

Q. It would not? A. No, sir.

Q. Captain, how long had these tarpaulins been aboard the vessels? A. I don't know, sir.

Q. They were old, weren't they? [250]

A. They were—

Q. (Interrupting.) They were torn?

A. No, I would not say that; but there was some old; there was one brand new hatch—

Q. (Interrupting.) What hatch did you have that on, that new one?

A. They were all new, on all four hatches, one tarpaulin—that is, I am not saying new, but I am saying they were new that spring.

(Testimony of P. H. Karbbe.)

Q. Captain, after you left Chilkoot did you ever have that hatch open until you got to Katchikan?

A. No, sir.

Q. Was it open at Katchikan?

A. Chilkoot until I got to Katchikan? Sure I had to open it in Sitka.

Q. You went from Juneau to Chilkoot and then to Sitka? A. Yes, sir.

Q. Had you delivered any coal at all when you took this cargo on at Chilkoot?

A. I had delivered coal in Juneau to get space.

Q. How much?

A. Well, that I don't know. I had to deliver coal enough to get space for the salmon.

Q. So that you put that off at Juneau?

A. Yes, sir.

Q. From what part of the vessel—you discharged some cargo at Ketchikan northbound, didn't you?

A. Yes, sir.

Q. Where did you take that from?

A. Well, I don't know. From one of the hatches, that is all [251] I know.

Q. How much did you discharge?

A. Oh, not an awful lot; we never had very much. Just general cargo, whatever it was.

Q. Did you yourself make any soundings in Seymour Narrows? A. In Seymour Narrows?

Q. Did you yourself make any soundings in Seymour Narrows?

A. No, sir, I never sound in Seymour Narrows.

(Testimony of P. H. Karbbe.)

Q. All you know about the bottom is what somebody told you?

A. I never sound in my life in Seymour Narrows.

Q. I mean Wrangell Narrows.

A. Yes, that was by myself.

Q. You handled the lead yourself? A. Yes.

Q. All around the ship?

A. All around the ship.

Q. And one depth of water all around the ship?

A. And one depth of water all around, sir.

Q. Were you moored out in the channel?

A. No, sir; we were stuck in the mud.

Q. You say there was an inspector came aboard the vessel at Juneau? A. I did not.

Q. Didn't come aboard at all?

A. I didn't say that at all. I said I spoke to the inspector.

Q. He never came on the vessel at all?

A. That I don't know anything about.

Q. He never came aboard the vessel to your knowledge?

A. I don't know nothing about that [252]

Q. You didn't have her inspected, as far as you know? A. No, did not.

Q. Did you use your pumps going north at all?

A. Well, yes, we used them that night we were hove to in that heavy gale.

Q. Where was that?

A. In Queen Charlotte Sound.

Q. Did you use them after that at all?

A. No. No need of it.

(Testimony of P. H. Karbbe.)

Q. Did the ship carry any dunnage at all?

A. Oh, yes; carried about 40,000 feet of dunnage—about 20,000 feet of dunnage we carried.

Q. What did you do with that dunnage when you had your coal in the ship?

A. Well, piled it up on the sides, you know. Then the coal comes up against it.

Q. Have any dunnage in the forward hold?

A. Yes, lots of it.

Q. What did it consist of?

A. Well, consisted of two-inch planks and three-inch planks, four-inch planks.

Q. Now, you put that dunnage between the cargo of salmon and the outer skin of the vessel to protect the canned salmon from wash on account of the roll of the ship, don't you? A. Generally do, yes.

Q. And you do that effectually; even if there is water in the bilge and it washes up inside of the skin of the ship, it don't damage the cargo?

A. Well, that I don't know. [253]

Q. That is the purpose you use the dunnage for, isn't it? A. That is the purpose.

Q. To keep the boxes away from the skin of the ship? A. Yes, that is the purpose of it.

Q. And if you use your pumps effectually, you don't get enough water in the bilge to damage the cargo, do you?

A. Well, it all depends. I would not say that. In the weather like we had, ship laboring hard, you know, it is pretty hard to get everything out of her; it slops from side to side and she is quick and you

(Testimony of P. H. Karbbe.)

can't pick it up, perhaps.

Q. This was in the most stormy period of the year that this voyage was made, wasn't it?

A. Yes, sir.

Q. You expected you would have rough weather, didn't you? A. Oh, yes.

Q. And you expected and knew that it was incumbent on you to dunnage the cargo, on the theory that the weather would be bad? A. Yes, sir.

Q. And you said the vessel always took some water? A. Yes.

Q. You knew that if the water was not kept down in the vessel and the cargo was not properly dunnaged, that its damage—salmon particularly—would be inevitable, didn't you? A. Yes, sir.

Q. Now, if this salmon on that vessel or around the skin of the vessel, if the cases were all wet and the labels were all blackened with coal-dust, it was because the [254] water in the hold of the vessel had been permitted to wash up and down the skin of the vessel and get to that salmon in the boxes—isn't that true?

Mr. BOGLE.—I object to that as not a proper question, not proper cross-examination. The witness has not testified as to what caused the damage.

A. I don't know. I never saw nothing; I could not say anything.

Q. (Mr. KERR.) What?

A. I don't know of anything being damaged.

Q. Now, just if you assume that those boxes were wet and damaged with black bilge water, damaged

(Testimony of P. H. Karbbe.)

with coal-dust, and the labels were all discolored and the boxes were all blackened, that they—

A. (Interrupting.) Where was it damaged, where was it damaged?

Q. Now, I am asking you, I say if you assume those boxes were all blackened with water and discolored with coal-dust and the contents of them—

A. Yes, sir.

Q. (Continuing.) —that is where they got it, wasn't it?

A. Yes, but where was it damaged, where, what part of the ship? I don't know nothing about this at all.

Q. You didn't go down into the ship to see at all at any time, either after you arrived at Yes Bay or after you arrived at Seattle?

A. No, sir; nothing was reported to me, so I don't see why I should.

Q. If it had been properly done, notwithstanding you had a rough voyage, the salmon that were in the hold of that [255] vessel could not have been damaged with that water from the bilge, could it?

A. Your Honor, I don't know where the salmon was damaged. Was it damaged in the bottom of the ship or where was it damaged?

Q. I say, if the cargo that you brought down from these canneries was damaged and the cases all blackened and their contents blackened with water discolored with coal-dust, it was because your cargo was not properly dunnaged?

(Testimony of P. H. Karbbe.)

A. The cargo was properly dunnaged, I can swear to that.

Q. You say that after you encountered these storms you directed the pumps to be worked?

A. No, I didn't direct the pumps, because the pumps was always working.

Q. They were always working? A. Yes, sir.

Q. Well, there was only one of them in commission, wasn't there?

A. Oh, there was lots of them in commission. There was just one, you know, that is just to take whatever water don't run through quick enough, you know. When the ship is rolling like that, the same as I am explaining—

Q. (Interrupting.) How many bilge pumps did you have on your ship? A. We had one.

Q. Had one bilge pump? How was it operated?

A. It is operated from the deck.

Q. And by steam or hand?

A. By steam and by hand, either way you wanted to do it. [256]

Q. Was it worked by either steam or hand?

A. It was worked by steam.

Q. Did you see anybody work that pump at any time on that voyage? A. Yes, sir.

Q. What? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. When you got into this storm around Sitka, did you work the pumps? A. Yes, sir.

Q. How long?

A. We worked it about every hour.

(Testimony of P. H. Karbbe.)

Q. For how long?

A. Well, as long as there was any water there to get out.

Q. By hand or by steam? A. By steam.

Q. Worked it by steam. So that when you got back to Sitka, was there any water in the hold?

A. No, sir.

Q. None at all?

A. Never was any water in the hold.

Q. Was there any water in the hold at the time you got back to Ketchikan? A. No, sir.

Q. Was there at the time you left Yes Bay or Chomley? A. No, sir.

Q. Was there any water in the hold when you arrived at Seymour Narrows? [257] A. No, sir.

Q. Was there any water in the hold when you arrived at Seattle? A. No, sir.

Q. You kept it out at all times? A. Yes, sir.

Q. Then how do you account for the fact that this salmon, these boxes, were all so stained?

A. I don't account—

Q. (Interrupting.) And the contents damaged?

A. I can't account for it only stress of weather, that is all I can account for it.

Q. You can't account for it if there was no water in the bilge, can you?

A. Oh, there is some water in the bilge all the time, your Honor—all the time.

Q. You want the Court to understand, do you, that no water got through the decks of the "Jeanie" on that downward voyage, into the hold where this cargo

(Testimony of P. H. Karbbe.)

was stowed? A. No, sir; I don't. No, I don't.

Q. Did it go in there, or did it not?

A. I don't know, sir. I can't tell you that.

Q. Did it go through these tarpaulins, or not?

A. I don't know.

Q. You don't know anything about that. Did you make any examination as you came, notwithstanding the stress of weather, to ascertain whether the ship was taking water from her decks?

A. I did not; no, sir; I could not.

Q. Did you examine her decks after you got down?
[258] A. I could not.

Q. Did you examine her decks after you got down?

A. I could not. The salmon was clogged up right on the decks.

Q. Did you calk her decks before you started away again with her? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you examine her decks?

A. Well, we examined when—we could not examine no decks. Everything was all right aboard of her, as far as I know.

Q. As I understand you, from Chilkoot to Gypsum you encountered about a thirty mile gale?

A. Just about.

Q. That is not extreme wind for up in that country at all? A. No, sir; no.

Q. Nor even here? A. No.

Q. And you went to Gypsum? A. Yes, sir.

Q. There you could not discharge and you went on down to Sitka? A. Yes, sir.

(Testimony of P. H. Karbbe.)

Q. On the way to Sitka you encountered another gale of twenty-five to thirty miles? That was not an extraordinary gale, was it? A. No, sir.

Q. For that time of the year?

A. No, sir. [259]

Q. You left Sitka for where? A. Sulzer.

Q. For Sulzer? A. Yes, sir.

Q. An there you encountered about a forty-mile gale?

A. Well, forty to sixty, I could not say; somewhere around there.

Q. You were going to Sulzer to deliver coal?

A. Yes, sir.

Q. And you were on the outside? A. Yes, sir.

Q. How far was it up to Sulzer on the outside?

A. Well, I think it was somewhere around two hundred—somewhere around two hundred miles.

Q. South of Sitka, or north?

A. South of Sitka.

Q. I meant south when I said north. That is on Prince of Wales, is it? A. Yes, sir.

Q. Outside? A. Yes, sir.

Q. When you encountered that gale, you went into Clarence Straits? A. Yes, sir—no.

Q. And which way did you—

A. Chatham—no; I went up to Cape Ommaney.

Q. Up Chatham Straits? A. Yes, sir.

Q. Never went back to Sulzer?

A. No, sir. Yes, I tried to get back the other way, inside, [260] then; I went inside onto Chatham Straits and out for Clarence Straits and

(Testimony of P. H. Karbbe.)

tried to get to Sulzer.

Q. Did you lay to in Chatham Straits?

A. Yes, sir, I stayed in Chatham Straits from eleven o'clock that night until almost daylight in the morning; then I shot across.

Q. Then you started off towards Sulzer?

A. Yes.

Q. Then you encountered the same storm, did you?

A. No, we had fine weather that day—that is, pretty good weather, and then we had snow that night; the next day we had a gale when I was trying to get out to Sulzer.

Q. Then you turned back and went to Sitka?

A. Went to Ketchikan.

Q. I mean to Ketchikan. I beg your pardon. And from Ketchikan you went first to Yes, Bay?

A. Yes, sir.

Q. And there you took on how many salmon?

A. I could not say; somewhere around thirteen or fifteen thousand.

Q. In what hold did you put this salmon?

A. Well, I don't know. I guess I put it in No. 2.

Q. You had had coal in No. 2. Was it all out of No. 2 when you put it in? A. Yes. Oh, yes.

Q. You had unloaded it at Ketchikan?

A. Yes, sir.

Q. You had completed the unloading?

A. Everything was through, yes.

Q. You were never in the hold after the coal was taken out? A. No, sir. [261]

(Testimony of P. H. Karbbe.)

Q. Now, you went from there to Chomley?

A. From Ketchikan?

Q. Yes. A. To Bonanza Cove.

Q. I mean Yes Bay?

A. Yes Bay to Bonanza Cove.

Q. And then went to Chomley? A. Yes.

Q. And at Chomley you took on how many cases of salmon?

A. I think it was 10,000. I am not sure. I could not say. I don't know.

Q. In what hold did you put this salmon?

A. Well, I put—or loaded No. 3 hold, you know. Whatever space I had in No. 2.

Q. Well, then you put the salmon you got at Yes Bay and Chomley in No. 2 and No. 3?

A. Yes, sir.

Q. Did you have any other cargo, coming south, except this salmon?

A. Yes, I had about eighty boxes of fish, herring, on deck.

Q. It was your principal cargo? A. Yes.

Q. After you left Chomley you went back to Ketchikan? A. Yes, sir.

Q. And then started south? A. Yes, sir.

Q. And you had bad weather all the way?

A. All the way.

Q. You filed a protest? A. Yes, sir. [262]

Q. Your protest, Captain, does not show any entries in your log-book from the 3d to the 6th of January. How does that happen?

A. The 3d to the 6th? Well, that is on the inside,

(Testimony of P. H. Karbbe.)

you know; that is—

Q. (Interrupting.) It was not very bad or you would have made some entries in your log?

A. I know, it might have been blowing, you know, she would not take any sea in the inside waters like that, you know.

Q. Is this transcript set out in your protest a complete transcript of your log?

A. Yes, sir. I took it out myself—out of the log-book.

Q. Did you have a long showing the movements of the vessel from Juneau up to Chilkoot and Chilkoot out to Gypsum?

A. Yes, sir, everything showed in the log-book.

Q. Now, nothing unusual occurred on your southward voyage until you got down to the Gulf of Georgia? A. No, sir.

Q. Were you able to come through the Narrows—Seymour Narrows, or did you wait for the tide?

A. I think I waited for the tide; I am not sure.

Q. Generally do, don't you? A. Yes.

Q. You can't come through unless it is slack water? A. Unless you strike it lucky.

Q. You pass through Seymour Narrows on high slack or low slack?

A. High or low slack, either one.

Q. You knew, when you were lying inside of Seymour Narrows [263] waiting for slack water, that this gale was blowing outside, didn't you?

A. No, I did not. If I had—I would have gone to anchor if I had known it.

(Testimony of P. H. Karbbe.)

Q. How far is Cape Mudge from Seymour Narrows?

A. Ten miles—somewheres around ten miles.

Q. You knew, long before you got to Cape Mudge, that there was a strong gale blowing in the Gulf?

A. No, it was just a moderate; I thought I could make it and then it would moderate, you know.

Q. When did you get into a gale, after you left Seymour Narrows, that began to make you think that you might encounter something that was unusual? A. Well—

Q. (Interrupting.) Where were you?

A. Towards dark. You know it gets dark there about five o'clock, in the winter.

Q. Yes.

A. I hung to it and then it was too late. It was this mist.

Q. Where was the wind from? A. Southeast.

Q. A southeast wind? A. Yes, sir.

Q. What was the gale when you reached Cape Mudge?

A. Oh, I should judge it was—no gale when I reached Cape Mudge—probably a twenty-five or thirty-mile blow.

Q. How much was it blowing when you were off Comox?

A. When we was off Comox, that was the next day, fine weather. [264]

Q. Fine weather? A. Yes.

Q. Just blew that night?

A. Just blew that night.

(Testimony of P. H. Karbbe.)

Q. Where were you from the north end of Texada Island when this storm was raging?

A. That was on the south end, you know, of Texada Island, when it cleared up in the morning, eleven o'clock.

Q. Well, then, any gale that you had during that night you had off the west side of Texada Island, because you didn't make but thirty miles from the Narrows in a number of hours?

A. Well, somewhere around thirty miles; I don't know, twenty or twenty-five.

Q. You could have escaped any gale that was blowing by going into Blubber Bay?

A. I could? I could not see my hand before me. I could have gone inside, inside of Cape Mudge, or gone into Duncan Bay, if I could have seen anything.

Q. When did this snowstorm break on you, before you left Seymour Narrows, or after?

A. No, long after. That broke in the evening. It was not snow, it was misty weather—misty and a little sleet and like that.

Q. Could you see any distance?

A. Yes, I could see the fore-castle-head of that ship, that is about all.

Q. You knew where you were?

A. No, part of the time I didn't know where I was.

Q. And you think that that night the wind blew fifty or [265] sixty miles an hour out there in the Gulf? A. Somewhere around there, yes.

(Testimony of P. H. Karbbe.)

Q. Head wind? A. Head wind, yes.

Q. Did you attempt to make headway against it, or were you simply lying to?

A. No, I was—I had to keep her full speed ahead to keep steerage way on the ship.

Q. And the next morning you say you were down about the south end of Texada?

A. Well, yes, just about the south end of Taxada Island I said—no, north end of Texada Island.

Q. The north end? A. The north end.

Q. How far is the north end of Texada from Cape Mudge?

A. Oh, about—Cape Mudge, about twenty-two, twenty-three miles, I guess, somewhere around there.

Q. You knew where Texada Island was?

A. Yes.

Q. Knew the direction? A. Yes.

Q. You did not make any effort to get any protection from that, did you?

A. No, I made effort to keep away from Texada Island and every other island in the Gulf.

Q. How long did that gale of wind last?

A. Well, at eleven o'clock she cleared up and we got fine weather—finest kind of weather.

Q. Was the storm or wind that you encountered in the Gulf of Georgia any more severe than that you encountered around [266] Sitka?

A. Oh, yes. Yes, a good deal; yes, only it was ahead, you know.

Q. Did you meet the "Humboldt" on that trip?

(Testimony of P. H. Karbbe.)

A. I didn't meet her. I saw her.

Q. Saw her on that trip? A. Yes.

Q. Did you see her when she came through Seymour Narrows? A. No.

Q. You did not?

A. No. She did not see me, either.

Q. Did she pass *her* on the way south?

A. Yes.

Q. Passed you where?

A. Well, I don't know where.

Q. She passed you between the south end of Texada Island and Active Pass, did she not?

A. No, she didn't.

Q. What? A. No.

Q. Where did she pass you?

A. I don't know, but I know she didn't pass us there.

Q. Where did she pass you?

A. I don't know, sir.

Q. And if her log don't show any such storm as that, you still say you had a sixty-mile gale, do you?

Mr. BOGLE.—We object to that. The log-book of the "Humboldt" is not in evidence here. We don't know what it shows.

A. The "Humboldt" went through about twenty-four hours—[267] about forty-eight hours before me—or thirty hours, anyway.

Q. (Mr. KERR.) As I understand you now, you say there was no snow in the Gulf of Georgia?

A. No, I don't think there was much. There

(Testimony of P. H. Karbbe.)

might have been a little sleet—that is all—a little snow.

Q. What time in the morning did you say you encountered clear weather?

A. Somewhere around eleven o'clock.

Q. Passed the Narrows?

A. Yes. I could not say what time. It was some time in the forenoon; that is the easiest way. It is a long time ago.

Q. At what hour did you arrive at Seattle, do you remember?

A. Some time in the afternoon, I think.

Q. Of that day? A. No, the next day.

Q. The next day? A. Yes.

Q. What day did you have the fine weather?

A. Well, the day before we arrived in Seattle.

Q. That would be on the 7th of January you encountered this nice weather, from eleven o'clock on?

A. Yes, somewhere around—from the forenoon on.

Q. Did you work the pumps at all on the 6th or 7th? A. Oh, yes, sir.

Q. Did you work them after you encountered the fine weather? A. No, sir; no need of it.

Q. You worked the bilge pump while the gale was on, did you? [268] A. Yes, sir.

Q. With steam?

A. Yes, sir, with the winch, you know, it goes with a messenger.

Q. Did you have any personal knowledge that the pump was worked? A. Yes, sir.

(Testimony of P. H. Karbbe.)

Q. Kept constantly at work, was it?

A. No, sir, just when—you know when a ship sucks you stop the pump or else you spoil the rubber or leather, whatever it is.

Q. What is your usual time from the south end of Texada Island into Seattle, by the "Jeanie"?

A. Oh, I don't know. I never figured that out.

Q. Now, after you got back to the Ketchikan from Chomley and Yes Bay, did you again have the hatches opened? A. No, sir.

Q. Where were they closed?

A. They were closed in Chomley.

Q. In Chomley; is that right?

A. Yes, that is right.

Q. Did you come through Seymour Narrows at low slack water or high, Captain?

A. I could not tell you, sir. It don't matter there whether it is low or high; there is lots of water.

Q. Was there any means of entering the hold of this vessel where this cargo was stowed, from the time you left Alaska until you got to Seattle?

A. No, sir, unless we took off the hatches.

Q. Unless you took them off? [269] A. No.

Q. And nobody entered the hold at all?

A. No, sir.

Q. All the seas you encountered, as I understand your testimony, were head seas practically?

A. Oh, no, no, we had all kinds of seas.

Q. Had all kinds of seas? A. Yes, sir.

Q. Did you have all kinds of seas in the Gulf of Georgia?

(Testimony of P. H. Karbbe.)

A. No, we had pretty much—only you know the ship will fall off and—

Q. (Interrupting.) A gale of wind here in December on the Sound—or January—anywhere on Puget Sound, is not an unusual thing, is it?

A. No, sir.

Q. A sixty-mile gale? A. No, it is not.

Q. It is not unusual anywhere along up this coast—a sixty-mile gale, in the winter time, is it?

A. No, sir.

Q. It is a thing you would naturally expect you might encounter on any voyage?

A. You may, yes.

Q. And even greater than that? A. Yes, sir.

Q. The wind blows off Flattery at times as high as eighty miles an hour? A. Yes, sir.

Q. And you have encountered gales in Alaska, sixty, seventy or eighty miles an hour? [270]

A. Yes, sir.

Q. You have encountered them with the “Jeanie,” haven’t you? A. Yes, sir.

Q. That particular voyage, from the middle of December until the 7th or 8th of January, was about the period of year when you would naturally expect the worst gales? A. Yes, sir.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Apostles on Appeal.
(IN TWO VOLUMES)

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Claimant of the Steamship "JEANNIE,"
Her Tackle, Apparel, Furniture, etc.,
Appellant,

vs.

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Appellee.

VOLUME II.
(Pages 289 to 517, Inclusive.)

Upon Appeal from the United States District Court for the
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Filed

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F. D. Monckton,

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(Pages 289 to 517, Inclusive.)

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division.

(Testimony of P. H. Karbbe.)

Redirect Examination.

Q. (Mr. BOGLE.) Captain, you stated your usual time from Ketchikan to Seattle was about seventy-six hours?

A. Somewhere around there—seventy-six to eighty-two.

Q. A little over three days? A. Yes, sir.

Q. On this trip you took approximately five days. How do you account for that?

A. Well, it is the head wind, southeast weather.

Q. On cross-examination, in answer to Mr. Kerr's question, you stated that a gale of eighty miles was nothing unusual and a gale of sixty miles was nothing unusual. On direct examination you said this was the worst weather you ever struck up there? A. Yes, sir; so constant.

Q. Constant? A. Yes, sir.

Q. What other gale did you encounter coming down, besides this gale which you encountered in the Gulf of Georgia? [271]

A. Well, sir, you know we had snow all the way down, snow and—inside, you know, you don't have very much seas breaking over the ship, but it blows strong all the time, just a gale of wind all straight along, but we never noticed it much because there was no sea breaking over the ship.

Q. And did you encounter any gale previous to to this gale you encountered in the Gulf of Georgia?

A. Yes, gales right along. There is that there—that—there must be something to show here. I don't remember everything; I can't remember so

(Testimony of P. H. Karbbe.)

long ago, you know, but I know we had a gale of wind right straight along. It will tell you—we were out there five days, and used to take us a little over three.

Q. Was this weather on this voyage the weather you would expect to encounter?

A. No, sir, it was too constant.

Q. Was it an unusually rough voyage?

A. Yes, sir, an unusually rough voyage.

Q. Do you know where the log-books of the “Jeanie” are?

A. No, sir, I don’t. I was left off of the “Jeanie” as soon as we came in.

Q. The “Jeanie” has since been wrecked, hasn’t she? A. Yes, sir.

Q. I wish you would look at this extended protest and state whether or not that correctly shows the entries of the “Jeanie’s” log-book? (Handing paper to witness.)

A. Yes, sir. It states Dixon’s Entrance—that must have been on the 4th. I left there on the 2d. We are in heavy gales and snow, and also on the 6th— [272]

Q. Let me ask you if that was a copy?

A. That is a copy of the log-book, yes, sir

Mr. BOGLE.—I offer that in evidence.

Mr. KERR.—I object to it on the ground that it is incompetent, irrelevant and immaterial.

Paper referred to was marked Claimant’s Exhibit 2.

Q. (Br. BOGLE.) Captain, how often have you

(Testimony of P. H. Karbbe.)

ever seen gales of sixty to eighty miles of wind in Alaska waters? A. Oh, every winter.

Q. And how long do those gales continue?

A. Well, sir, sometimes they continue quite a while; sometimes you run *out them*. With a fast, speedy ship, you know, you run out of them. Of course, a slow ship you have got to lay there and take it.

Q. Have you ever encountered a gale of wind of this strength that continued for the length of time that the gales continued on this voyage, in your experience in Alaska waters?

A. Yes, sir, I saw a gale of wind right from leaving Seattle until I got back to Seattle, but it has been in ships that had lots of power.

Q. Is that a usual or unusual occurrence, to strike a gale of wind that continues as long as this gale did?

A. No, sir, I never saw it before—not that way. Of course, as I say, she was slow and she was laying and taking her medicine.

Q. Captain, whose duty is it to look after the stowage of cargo?

A. Well, it is—everything is up to the master, but then you [273] tell the mate what to do and you expect him to do it.

Q. Isn't it the mate's duty, primarily, on these vessels?

A. It is the mate's duty to do it. You tell him what you want done and he will do it.

Q. You did not see this cargo after it arrived and

(Testimony of P. H. Karbbe.)

the hatches were opened up—after the ship arrived in Seattle?

A. I was down—I was sick when we got in here and I went down one day and there was not a word said to me.

Q. You have no knowledge as to how the cargo was damaged, have you? A. No sir, I have not.

Q. Or whether water came through the decks?

A. No, sir. I don't know nothing about it.

Q. Captain, I think you stated—I am not quite sure—as to the tide when you went on this muddy bottom in Wrangell Narrows. Would you state it was the same state of tide when you went on and when you went off?

A. Yes, sir, just the same—eight foot six.

Q. In connection with these tarpaulins, you did not testify that they were new tarpaulins—all of the tarpaulins were new ones on each hatch?

A. No, sir, they were not very; they were there when I joined the ship in June.

Q. You testified as to some of the tarpaulins being new. I didn't know whether you meant they were all new.

A. No, sir. No, they were old tarpaulins, only there was one new—what we call new, that is, the latest one on each hatch.

Q. There was one new one on each hatch?

A. Well, that is the latest one, what we call a new one. [274]

Q. Were those new tarpaulins in good condition?

A. They were in good condition, as far as I know.

(Testimony of P. H. Karbbe.)

Of course that *was mate* to know.

Q. That would be up to him?

A. That would be up to him.

Q. You say you reported to the inspector when you stopped at Juneau? A. Yes.

Q. You don't know whether he made any examination or not? A. No, sir.

Q. Did he authorize you to proceed on your voyage?

A. He told me "That's all right; go ahead."

Mr. KERR.—I object to that—what he told him—as incompetent.

Recross-examination.

Q. (Mr. KERR.) What is the speed of the "Jeanie," how much, how many knots does she steam?

A. Well, you mean in weather like this?

Q. No, I mean in any weather when you were on her; take just the average weather, what would she steam?

A. Well, she would steam seven in a calm.

Q. She would steam seven knots?

A. In a calm.

Q. About eight miles an hour?

A. No, we will call that seven miles an hour.

Q. Seven knots? A. Yes. [275]

Q. Or seven miles—which is it?

A. Well, call it seven knots.

Q. Now, you were on the "Spokane," captain, a long time? A. Yes, sir.

Q. This little gale that you had out here in the

(Testimony of P. H. Karbbe.)

that could only make seven knots an hour?

A. That is about the size of it, I guess.

Redirect Examination.

Q. (Mr. BOGLE.) How long has the "Jeanie" been running out of the port of Seattle?

A. Oh, about fourteen or fifteen years, I guess.

Q. She has been on practically the same voyage during all that time, hasn't she?

A. Yes, sir, practically.

Q. And she has been practically in the same condition, hasn't she?

A. Yes, in the same condition.

Q. And who did you receive your instructions from about taking this salmon aboard?

A. I got a telegram in Juneau from Mr. Swan.

Q. He is the—

A. (Interrupting.) He is the manager.

Q. Of the charterers?

A. Yes, of the charterers.

Recross-examination.

Q. (Mr. KERR.) Captain, was it the duty of the first or the second mate to look after the hold of the vessel? [278] A. The second mate.

Q. The first mate was sort of a pilot, wasn't he?

A. Yes, sir.

Q. He didn't have anything to do with it?

A. No.

Q. When you talk about new tarpaulins, you mean that there were a lot of old rotten tarpaulins on there and there were some that were not so bad?

Mr. BOGLE.—I object to that.

(Testimony of P. H. Karbbe.)

A. No, I don't know about that part.

Q. (Mr. KERR.) You call those that were not so bad the new ones?

A. They were all—they were fair tarpaulins, all of them.

Q. You mean by "fair" they had been on there so long that they were pretty ancient, all of them, weren't they, but some of them happened to be a little more modern than the others?

A. We made one trip with the same tarpaulins.

Q. If you did you got salmon that time, didn't you? A. No.

Q. Did you have any salmon on that trip?

A. No, I don't think we did. I think I cleaned out all the places. We may have.

(Witness excused.) [279]

[Testimony of R. E. Small, for Claimant.]

R. E. SMALL, being recalled on behalf of claimant and respondent, testified as follows:

Q. (Mr. LAWRENCE BOGLE.) Mr. Small, at the time of your former examination I asked you if you had any record of the amount of salmon of the grade known as chums, belonging to the Alaska Pacific Fisheries, sold by you during the month of January, 1913?

A. I find that—you want me to tell the number—the quantity sold during that period, that I was obligated to deliver, which is the same thing practically?

Q. Well, you might segregate it by telling first the amount that you were obligated to deliver for the libelant in this case— A. Yes.

(Testimony of R. E. Small.)

Q. (Continuing.)—during the month of January and afterwards, the salmon that you sold during that month, to be delivered in that month?

A. Yes. I might say—I might answer that question by saying that it was so trifling that it is hardly worth considering, of any actual sales made during that month. I can give you the sales that were—well, I will make the direct statement: About 8,500 cases of chums sold during that period.

Q. Were those all sold—

A. (Interrupting.) They were not shipped in January.

Q. When? A. They were shipped in February.

Q. They were sold at—

A. (Interrupting.) They were sold sometime during the [280] month of January.

Q. For— A. For February shipment.

Q. Were those all shipments of the Alaska Pacific Fisheries? A. Yes, sir.

Q. And those were all of the brand known as chums? A. The grade known as chums.

Q. Have you got the brand? A. Yes.

Q. What were the brands?

A. There was 4,000 under the Spear brand, 1500 under the Trolling brand, and 3,000 under the Antler brand.

Q. Mr. Small, do your records show to whom you sold the 4,000 of the Spear brand?

A. Yes; Pacific Commercial Company, Manila.

Q. And 1500 Trolling? A. Yes, same parties.

Q. And they were shipped on what date?

(Testimony of R. E. Small.)

A. On February 8th, is the date. I have a shipment on that.

Q. They were shipped on that date, were they?

A. Yes, that is the date of shipment.

Q. Did you sell any other grades?

A. No. I shipped—I shipped out sales that were made on a contract, Mr. Bogle, of pinks; you are confining your questions all to chums or all grades?

Q. No, pinks now?

A. Well, pinks, I had a balance of a contract we shipped out on January 25th, 1500 cases.

Q. To whom did they go. [281]

A. They went to a concern by the name of Cluet & Company, in Singapore, Strait Settlement.

Q. And they were shipped on what date?

A. January 25th.

Q. Did you ship any other pinks during the month of January?

A. Well, the rest are trifling amounts, Mr. Bogle, that went out in cars, that the exact date is not specified; as to just when they rolled I can't tell exactly. These large amounts show specifically when they did; but we ordered them out and the time of shipment is not designated clearly, you know. They are strung along so that I could tell—in taking off a transcript of this I simply stated the small amounts would be grouped together in those—during that period from January 8th to March 21st.

Q. How much did it amount to?

A. The total amount, including the 1500 cases of

(Testimony of R. E. Small.)

pinks that went to Cluet, amounted in small shipments up to 4,234.

Q. That includes the 1500?

A. That includes the 1500.

Q. Now, those were all for the Alaska Pacific Fisheries? A. Yes, sir.

Q. Did you ship any other brands or grades for them during the month of January?

A. During that period I shipped 708 cases of reds.

Q. That is, from January 8th to March 21st?

A. January 8th to March 21st.

Q. How many was that?

A. 708 cases of reds—comparatively small amounts.

Q. Do you know where they went? [282]

A. No, I don't.

Q. Do you know when they were shipped?

A. No, not exactly.

Q. Various times?

A. Various times. And 166 cases of medium reds, and 100 cases of halves, same grade. That is all, that comprises the entire shipments of that, making a total of 13,708 cases during that period.

Q. What were the brands, pinks?

A. Yes, I have the brands, I can show you the brands in detail. The Mandarin brand was the brand shipped on the 1500 cases.

Q. And what were the other brands?

A. There was 422 cases of Black Top; 91 cases of Victor; 115 cases of Surf.

Q. How many was that, 115?

(Testimony of R. E. Small.)

A. 115. Then we shipped an unlabeled lot out, 861 cases; and 100 cases of Black Top; 200 cases of Antler—wait a minute now, that is in wrong, that Antler does not belong in that or should have gone in the chums, that Antler is a chum brand; he has got it in wrong here, that should not go in, strike that out—that 200 Antler.

Well, there is 452 cases of unlabeled; 50 cases of Bugle; 268 cases of unlabeled; 100, Victor, and 75 Bugle; that is all the pinks.

Q. And what were the reds, the brand of the reds?

A. The brand was Sea Lion in all instances, with the exception of 50 cases, 50 cases were unlabeled; 278 cases in one lot, 80 in another and 50 in another.

Q. That comprised all the salmon that was sold by you for account [283] of Alaska Pacific Fisheries from January 8th to March 25?

A. Yes, that is all.

Q. March 21st?

A. Yes, March 21st, obligated for delivery.

Q. Obligated for delivery? A. Yes, sir.

Q. Did you sell any salmon for the Alaska Pacific Fisheries which you were unable to deliver during that period? A. No, sir.

Q. Do your records show the amount of salmon which was on hand in the warehouse at Seattle, subject to your orders, on January 8th, 1913, belonging to the Alaska Pacific Fisheries?

A. Have I that record?

Q. Yes. A. Yes, sir.

Q. I wish you would give me that record.

(Testimony of R. E. Small.)

A. I have the record of 1,269 cases of reds—red talls that means.

Q. Do you know how many of those were on the—

A. (Interrupting.) Yes, exclusive of the “Jeanie” cargo.

Q. Exclusive of the “Jeanie” cargo?

A. Yes. The question that you are driving at is to show that there was stock on hand exclusive of the “Jeanie” cargo?

Q. Yes, exactly. A. Yes, I understand.

Q. The 1,269 cases of reds were all of this Sea Lion brand?

A. Yes, they were practically—all but 117 cases were of [284] Sea Lion brand.

Q. And what were the 117?

A. Unlabeled. Applied them wherever we chose.

Q. And what other salmon did you have on hand?

A. We had 2,384 cases of King talls unlabeled.

Q. Were those reds?

A. Those are a Chinook salmon. They are practically a—but they don't come into the regular grades at all.

Q. You are familiar with the cargo which was aboard the “Jeanie”?

A. Yes, in a general sort of a way.

Q. I will ask you if any of the cargo aboard the “Jeanie” was of this brand which you have last mentioned? A. Oh, this Sea Lion?

Q. No, of this Chinook salmon?

A. Oh, no, this is all unlabeled—this stuff is unlabeled.

(Testimony of R. E. Small.)

Q. And what other salmon was there?

A. Well, 1,206 cases of tall medium reds; they were all under one brand—the Empire brand; and 1,539 halves of the same grade—medium reds—under the unlabeled; they were unlabeled. And under pinks 10,152 cases, a total made up in detail of 591 Mandarin and 3,949 Rajah, 2,267 Black Top, 1,882 Surf, 173 Bugle and 1,290 Victor. That is the detail on that. And 17,767 cases of Chums, comprising 1,471 Trolling, 1,736 Spear, 3,827 Trolling, 3,536 Spear, 3,808 Antler, 3,389 unlabeled, and 1,184 halves, unlabeled—no, 1,184 Antler Chums, halves.

Q. That was on hand on January 8th?

A. 8th, yes.

Q. Did you receive any other shipments between January 8th [285] and March 21st?

A. I think I testified to that in my former—but I have forgotten what I said—I think I looked that up at the time. I think that appears in my testimony, Mr. Bogle. I didn't post myself in regard to whether there was at this time.

Mr. BOGLE.—Well, I have not had a chance to go over it, Judge. If it does not appear, I suppose we can stipulate about it.

The WITNESS.—I will make a notation of that and get that; but I think I testified in regard to that before.

Mr. BOGLE.—If it does not, I suppose, Judge, we may enter a stipulation on that.

Judge HANFORD.—Yes.

The WITNESS.—It is very easy to give you that.

(Testimony of R. E. Small.)

Q. (Mr. BOGLE.) Mr. Small, did you receive any orders for any salmon of the grade which was comprised or included in the January shipment, during this period from January 8th to March 21st, which you were unable to fill? A. No, sir.

Q. Did you have sufficient salmon of all those grades on hand to fill all orders?

A. Yes, sir. Now, Mr. Bogle, we filled—just to elaborate a little on my—perhaps before he takes it down—I will just put this question to you: We filled—some of these orders that I have told you that we had, we filled them out of the “Jeanie’s” cargo because it happened to be convenient, only.

Q. Well, now, what do you mean by that?

A. Well, now, for instance, here we filled this Pacific [286] Commercial. Company, on Spear Chums and Trolling Chums, we filled because we were in the process of overhauling it at that time of the shipment and we would use those instead of using stock that we already had in stock, that we could have used.

Q. Was that because this—

A. (Interrupting.) Just a minute, Mr. Bogle. I have answered that a little incorrectly, I would like to qualify my statement. I just want to get myself a little bit—no, I think my statements are correct, Mr. Bogle. I used them, but I didn’t have to use them.

Q. You had plenty of other salmon of the same grade? A. Yes.

Q. Then, as a matter of fact, Mr. Small, did the

(Testimony of R. E. Small.)

Alaska Pacific Fisheries lose any market or lose any sale of salmon because of the damage to the "Jeanie" salmon?

A. I can't say that thye did; no, sir.

Q. Why did you use a portion of this "Jeanie" salmon, Mr. Small, in preference to salmon which you had in stock?

A. Simply as a matter of convenience, because it was being overhauled and we would apply it conveniently.

Q. This salmon had been overhauled and freshly labeled? A. And freshly labeled.

Q. And in first-class condition?

A. In first-class condition; after the overhauling we let it go out.

Q. You knew that salmon was all right?

A. Absolutely.

Q. Without any inspection?

A. Without any inspection. [287]

Q. The other salmon you would have to test, wouldn't you, go over it?

A. We would naturally inspect it to some extent before it went out.

Q. What would that inspection consist of?

A. Oh, just a cursory examination, opening up a few cases here and there, to see that it was in good condition. We don't go to the extent of opening up every case or anything of that sort. If we found any trace of any trouble, we would probably make more extensive examination.

Q. You do, however, go over the cases to find out,

(Testimony of R. E. Small.)

a case here and there?

A. Yes, here and there to see—

Q. (Interrupting.) To see if it is in proper condition? A. Yes.

Q. Do you very often find that it has to be—cases have to be cleaned, Mr. Small?

A. We occasionally run across cases where we have to eliminate some of the cases, for stain or something, or perhaps a little shaky or something of that sort. Generally speaking, before we ship on these long voyages we recooper the whole thing.

Q. What do you mean by that?

A. Well, we renail it, you know, to see that the cases are in proper shape for shipping.

Q. What is the expense of that?

A. Oh, trifling, three cents a case, maybe four cents a case; I have forgotten just what the price is.

Q. That is the renailing? [288]

A. For renailing, yes.

Q. If you find some of the cases are dirty, do you require them to be replaced with new cases entirely?

A. Well, it depends; that would be entirely to the extent, you know. I could not state where the dividing line would be; might be a slight—if there was only just a small stain here and there, we probably would not pay any attention to it, but if the case was defaced to considerable extent we would probably eliminate it entirely.

Q. Did you ever call for any of this salmon from the “Jeanie” shipment and were unable to get it

(Testimony of R. E. Small.)

for delivery, Mr. Small?

A. I don't recall any such instance.

Cross-examination.

Q. (Mr. Judge HANFORD.) I am not sure if I understood you, Mr. Small, in regard to these lots of unlabeled salmon. Were they marketed in that condition, unlabeled?

A. Yes, they were marketed in that condition.

Q. Will you explain why that was?

A. Oh, probably somebody wanted them unlabeled—shipped unlabeled and put their own labels on at the other end themselves, which is not an uncommon occurrence in our business.

Redirect Examination.

Q. (Mr. BOGLE.) This paper which you handed me is the opening [289] prices of the various—

A. (Interrupting.) That is the opening prices of the season of 1912, for the pack of 1912.

Q. Do you know what this salmon you sold in the months of January, February and March—what you sold that for, what you got for it?

A. Well, I don't recollect, I don't know just that; I can very easily furnish that information, but I haven't it with me.

Q. Do you know for what price the "Jeanie" salmon sold?

A. No, I don't know. The price, as I testified in my testimony—in my direct testimony, there was a very considerable fluctuation for this period; we had a very ragged market and there were quite a good many goods.

(Testimony of R. E. Small.)

Q. That was because of the condition of the market?

A. Yes, the market conditions were very unhappy during the spring of 1913.

Q. That had nothing to do with the damage to the "Jeanie"—

A. (Interrupting.) No, not the slightest.

Q. You didn't get a smaller price for this salmon—

A. (Interrupting.) Not a particle; had no bearing whatever.

Q. It had no bearing upon the sale of the pack of the Alaska Pacific Fisheries?

A. Not at all. The condition of the "Jeanie" cargo, after it was properly overhauled, was in just as good condition as any salmon there was packed.

Q. I mean the fact that this salmon was damaged did not affect the sale of the pack by the Alaska Pacific Fisheries? A. No, sir, not at all. [290]

Q. And the delay in reconditioning the salmon did not affect the returns which they got from it?

A. Not at all.

Mr. BOGLE.—I will introduce this in evidence.

The paper designated "Opening Prices August 23d, 1912," was marked Claimant's Exhibit 3, same being attached hereto and returned herewith.

(Witness excused.) [291]

[**Testimony of W. C. Dawson, for Claimant.**]

Seattle, Washington, July 1, 1914.

Present:

Judge C. H. HANFORD, for Libelant.

Mr. LAWRENCE BOGLE, for Claimant.

W. C. DAWSON, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. BOGLE.) *That* is your business?

A. I am in the shipping and warehouse business.

Q. How long have you been in the shipping business? A. Twenty-four years.

Q. During that time have you been acting as manager of steamship lines—you have not been actively in sea-faring life? A. No.

Q. You have been managing lines?

A. My work has been, in the office at first and afterwards in the operating department.

Q. Mr. Dawson, in the year 1912, were you interested in the charter of the steamship "Jeanie"?

A. Yes, sir, with Mr. W. F. Swan.

Q. Do you remember when that charter went into effect, Mr. Dawson, roughly?

A. My recollection is the early part of the year. I think about the 1st of April; I would not be sure about that.

Q. Do you know what condition the steamship "Jeanie" was in at the time you took her over?

A. She was in first-class condition.

Q. Was she inspected at that time for the purpose of determining what condition she was in?

A. Not to my knowledge. [292]

(Testimony of W. C. Dawson.)

Q. Do you know whether or not the steamship "Jeanie" was in drydock while she was under charter to you?

A. Yes, sir; she was in drydock after that; it was in the month of July.

Q. I do not suppose you know what repairs were made on her at that time, do you?

A. I cannot say at this time.

Q. While she was under charter to you and Mr. Swan, in what trade was she engaged?

A. She was between Puget Sound and South-eastern Alaska ports.

Q. Mr. Dawson, were any repairs or necessary work done on the "Jeanie" subsequent to July, 1912, and prior to the time of this voyage in December, 1912?

A. I have no recollection except the work that was done in the drydock in July; there was some calking done on the vessel in September, around her decks and around her stem.

Q. I hand you this paper and ask you if that is a copy of the bill for calking?

A. Yes, sir, that is the bill of King & Winge; it covers the calking I refer to.

Q. Does that show the work that was done on her in September, 1912? The work that was done on the decks? A. Yes, sir.

Q. Just in a general way, what did that work consist of?

A. I do not know any better way to show that than by reading the bill.

(Testimony of W. C. Dawson.)

Q. I want to offer that in evidence; but is that for calking? [293]

A. That was for calking around her stem and around one of the winches. The deck was reported leaking around one of the winches on the previous voyage, and the vessel was supposed to have taken a little water around the stem under the sheathing, which was stripped off and calked.

Q. Who reported this condition to you?

A. The master.

Q. The master of the "Jeanie"?

A. Yes, sir. I think he reported it to Mr. Swan; I do not know that it was reported to me at all.

Mr. BOGLE.—I offer this bill for the purpose of showing the repairs done at that time.

Paper marked Claimant's Exhibit 4, filed and returned herewith.

Q. Have you ever had wooden vessels under your management in the steamship business?

A. Yes, sir.

Q. Ordinarily, how often is it necessary to calk decks of wooden vessels engaged in the Alaska trade?

A. I should think that a prudent operator would overhaul the decks at least once a year.

Q. And if there was any damage to the deck or any repairs necessary, who notifies you of that fact?

A. The master, ordinarily.

Q. Does the master report to you—did he report to you previous to this voyage in December, 1912, that there were any necessary repairs to the "Jeanie"?

(Testimony of W. C. Dawson.)

A. I have no recollection of any such report except in this instance that this bill covers (exhibit 4).
[294]

Q. I mean immediately prior to this voyage in December. A. No, sir, not to my knowledge.

Q. If any such report had been made in the course of business, would you have had the necessary repairs done?

A. We certainly would have, yes. The vessel was carrying perishable cargo and it would be necessary for the decks to be tight.

Q. Mr. Dawson, were you down at the dock the day the "Jeanie" arrived on or about January 8th, 1913, with this damaged cargo?

A. I don't recollect—yes, I was at the dock when she arrived.

Q. Mr. Burekhardt and the officers of the libelant corporation, testified that on that date a meeting was held on the dock, at which you were present representing the charterers; Mr. Burekhardt was there representing the libelant company, Mr. West was present, stated to represent the insurance companies and Mr. Hall representing the dock company, at which some agreement was reached as to taking care of this cargo—this damaged cargo. Do you remember that meeting, Mr. Dawson?

A. Yes. That meeting was a few days after the arrival of the steamer, after the cargo had been discharged.

Q. Had the cargo practically all been discharged?

A. The cargo had all been discharged.

(Testimony of W. C. Dawson.)

Q. Were these gentlemen present at the meeting?

A. Yes, sir.

Q. Anyone else that you remember?

A. I think both the Burckhardts were there and my recollection is the others you have mentioned.
[295]

Q. Now at that time, Mr. Dawson, had the damaged cargo been segregated from what was considered good cargo, undamaged cargo rather?

A. The dock company had piled the damaged cases separately from the other which were not damaged—did not show damage.

Q. Had that segregation been made at the time of this meeting? A. Yes, sir.

Q. I wish you would state, Mr. Dawson, in your own way, just what took place at this meeting between you gentlemen.

A. I was requested to go down there by Mr. Burckhardt, to ascertain the best method to recondition the cargo, and it was decided while we were there that Mr. Horner should recondition the cargo. And this was agreed upon by Mr. Burckhardt, Mr. West and myself. I asked each one individually if this was satisfactory to have Horner recondition the cargo and let the responsibility rest where it was proven to be. And under these conditions the cargo was reconditioned.

Q. Now, in speaking of the cargo, Mr. Dawson, do you mean the entire cargo of some 29,000 cases?

A. We only discussed that which was damaged at that time—which we knew was damaged.

(Testimony of W. C. Dawson.)

Q. Was that the cargo which had been segregated?

A. Yes, sir.

Q. Was anything said at all at that time about the balance of the cargo which was apparently in good condition? A. Not to my knowledge. [296]

Q. Was any agreement made with reference to this other cargo?

A. We made no agreement except that Horner would recondition that portion of the cargo which was very evident was damaged.

Q. That is what I am getting at. The agreement relates solely to that damaged cargo which had been segregated by the dock company, or did it relate to the entire shipment?

A. It related to that which had been segregated by the dock company.

Q. Did you at that time, Mr. Dawson, know that there was any damage to the other cargo?

A. No, I did not.

Q. Did Mr. Burekhardt, or the libelant, the Pacific Fisheries, at that time make any claim that the balance of the cargo was damaged?

A. I have no recollection that it was mentioned.

Q. Did the libelant in this case or any of its officers ever make a claim against you for damage to the balance of that cargo?

A. Not to my knowledge; not directly.

Q. Well, did you ever receive a claim from them directly or indirectly, that is, you personally, or the charterers of that vessel?

A. I believe a claim was presented later to Mr.

(Testimony of W. C. Dawson.)

Swan for reconditioning the cargo. But whether or not that covered the entire shipment I could not say at this time. Mr. Swan and I discussed that claim, whatever it was, but I have forgotten the amount. [297]

Q. How long was that, Mr. Dawson, after the arrival of this vessel? In other words, how long after January 8th?

A. Well, I could not say at this time; it was a considerable period after that.

Q. Was it after the entire shipment had been reconditioned?

A. Why, it must have been, for the bill referred to the reconditioning of the whole shipment.

Q. In what shape did this bill come to you or to your company?

A. I think the bill was presented to Mr. Swan.

Q. What bill is this?

A. The bill for reconditioning the cargo; I have never seen any other.

Q. Was that Horner's bill or claim presented by the Alaska Pacific Fisheries?

A. I think it was the bill of the Alaska Pacific Fisheries which was really a copy of Horner's bill to it.

Q. Do you know whether or not the Alaska Pacific Fisheries had paid Horner's bill? A. I do not.

Q. What action did you take with reference to that bill?

A. Well now, do you want my conversation with Mr. Swan—that was all there was in connection with it.

(Testimony of W. C. Dawson.)

Q. All I want to know is whether you accepted it and agreed to pay it or whether you rejected the bill?

A. Why, we rejected the bill; we did not consider we were responsible.

Q. Did the Alaska Pacific Fisheries ever present another bill to you, make any further claim against you? A. Not to my knowledge. [298]

Q. Did you at any later time agree to pay this bill?

A. No.

Q. Did you ever have any negotiations toward settlement of it? A. No.

Cross-examination.

Q. (Judge HANFORD.) Referring to the time when there was a conference on the dock between yourself and the Burckhardts and Mr. Swan, can you recall now what was said in that conversation, in addition to your asking each one if it was satisfactory to have Mr. Horner recondition the goods?

A. The conference was for the purpose of determining—

Q. What I want to get at, Mr. Bogle has asked you leading questions here if your understanding related solely to some of the goods that were known to be damaged, or whether it included damages not yet ascertained. I want to know what was said to give you the right to say that it was limited to those which were known to be damaged.

A. There was nothing said at that time about anything except the damaged salmon.

Q. When the bill was presented to Mr. Swan, the claim of the Alaska Pacific Fisheries including the

(Testimony of W. C. Dawson.)

Horner bill, were you present when that was presented? A. My recollection is that I was not.

Q. Do you know who presented it?

A. I do not, no, sir.

Q. Do you know what it consisted of, whether there was anything in addition to the bare bill made out by Mr. [299] Horner?

A. I cannot say that there was anything additional.

Q. Was Mr. Horner himself present at the time of this conference you have referred to, when it was agreed he should recondition the damaged goods?

A. Yes.

Q. He was present. A. Yes.

Q. Was it reported to you that some of the cases which had been carried into the warehouse had been found to be damaged on being opened in the warehouse?

A. I had knowledge of that through my connection with the dock company.

Q. Did you ever at any time inspect the shipment of the Alaska Pacific Fisheries salmon as an entirety? A. No, sir.

Q. Were you present when the work was being done in the warehouse of cleaning, relabeling and fixing up these cans? A. I think I was once only.

Q. Do you know about how many employees Mr. Horner had at work there? A. I do not know.

Q. You did not take any notice of them?

A. No.

Q. While the "Jeanie" was under charter to you

(Testimony of W. C. Dawson.)

and Mr. Swan, who was the active manager of operations of the boat? A. Mr. Swan. [300]

Redirect Examination.

Q. (Mr. BOGLE.) Mr. Dawson, on cross-examination you said you had knowledge of the fact that this cargo was being reconditioned. How did you obtain that knowledge?

A. I am personally interested in the Virginia Street dock where the cargo was reconditioned, and I have knowledge of most everything that goes on down there.

Q. Well, of what did your knowledge consist with reference to this cargo? In other words, was there anything reported to you, or did you merely see them going over the cargo?

A. I knew from my connection with the dock company, that they were reconditioning the entire shipment. I just got that as general information. I do not know that any particular person told me that that was the case, but they might have.

Q. Did you know for whose account that was being done?

A. I presumed it was Burekhardt; I don't know who else ordered it done except Burekhardt.

Q. Did Burekhardt give you notice that it was being done and that the ship would be held for it?

A. Not that I have any recollection of.

Q. Or that he would or had made a claim for that work?

A. I have no recollection of such conversation with Burekhardt.

(Testimony of W. C. Dawson.)

Q. Who unloaded the "Jeanie" cargo and made this segregation?

A. It was unloaded by stevedores and the dock company.

Q. Who were they acting for, who employed the stevedores?

A. The ship employed the stevedores.

Q. Were they acting for the ship in that work?

[301] A. Oh, yes.

Q. Who made the segregation of the damaged cargo? A. The dock company.

Q. Who were they acting for?

A. For the consignees of the cargo.

(Witness excused.) [302]

[Testimony of W. F. Swan, for Claimant.]

W. F. SWAN, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. BOGLE.) What is your name?

A. W. F. Swan.

Q. Your business? A. Steamship business.

Q. How long have you been in that business?

A. Sixteen years.

Q. You were interested with Mr. Dawson in the charter of the "Jeanie" in 1912, were you?

A. Yes, sir.

Q. And were you the active operating member for the charterers? A. Yes, sir.

Q. Do you remember when the "Jeanie" was on drydock after you took her under charter?

A. Yes, sir. I remember that she was drydocked.

Q. You do not know what repairs were done at

(Testimony of W. F. Swan.)

that time, do you? A. No, sir, I do not.

Q. Was any report made to you, Mr. Swan, as to any needed repairs or any defective or unseaworthy condition of the "Jeanie" prior to the time she sailed on this voyage in 1912?

A. I do not remember of any particular report.

Q. If any such report had been made, would not you have made the repairs? A. Yes.

Q. And did you make any repairs?

A. Well, I cannot say as to whether I did or not. Some [303] minor repairs might have been.

Q. I mean immediately prior to the time she started on the voyage in question in 1912?

A. I do not remember that I did.

Q. Do you remember what condition the "Jeanie" was in at the time she started on that voyage?

A. Apparently in good condition.

Q. Mr. Swan, did you receive this order or make an agreement with the Alaska Pacific Fisheries for the carriage of this salmon, the damage to which was the cause of this litigation?

A. Yes, I had been carrying their freight for the season north and south bound.

Q. Had you hauled previous shipments of salmon on the "Jeanie"? A. Yes, sir.

Q. That same season? A. Yes.

Q. Do you remember when the last shipment was, previous to this? A. I do not.

Q. You had hauled salmon for these same parties that year, had you? A. Yes, sir.

Q. Was this agreement made to haul this particu-

(Testimony of W. F. Swan.)

lar salmon after the "Jeanie" had left here?

A. I do not remember.

Q. With whom did you make that agreement?

A. Mr. Burckhardt.

Q. Was the agreement to haul this salmon on the "Jeanie"? [304] A. Yes, sir.

Q. On the steamship "Jeanie"? A. Yes, sir.

Q. You were not present at this conference on the Virginia Street dock, were you? A. No, sir.

Q. Did you see this salmon at all after the "Jeanie" arrived? A. Part of it, yes.

Q. When did you see it, before or after it was unloaded?

A. Well, during the time they were discharging.

Q. Do you remember where they were taking it from at the time you saw it? A. Forward hatch.

Q. Taking it out directly underneath the hatch?

A. Yes, sir.

Q. And what was the condition of that cargo?

A. Some of the cases were wet.

Q. Mr. Swan, did the Alaska Pacific Fisheries ever make a claim upon you for this damage; if so, when?

A. I think they first somewhere about the latter part of March, they presented a bill, or else Mr. Horner presented a bill, I don't remember which. It was a bill of Horner's for reconditioning the cargo. And then if I remember correctly they presented a bill, that is, the Alaska Pacific Fisheries presented a bill sometime later.

Q. How much later?

(Testimony of W. F. Swan.)

A. Oh, I don't remember just how long it was; two or three months, I should say.

Q. Do you know whether or not Mr. Horner's bill had been paid by the Alaska Pacific Fisheries at the time the [305] Alaska Pacific Fisheries presented it to you?

A. I think that they presented a receipted bill.

Q. And made claim upon your—the amount of that, did they?

A. Yes, sir, I think that is the way.

Q. Did they ever at any time claim any other amount, any larger amount?

A. I do not remember that they did.

Q. Now, what did you do when you received this bill of Horner's; what action did you take on it?

A. I talked to Burckhardt about it. I did not take any action any more than talking to him in regard to it.

Q. Did you have any conversation with Mr. Dawson about it? A. I think I did, yes.

Q. Well, did you agree to pay that bill, or did you reject it?

A. I did not agree to pay it. I did not have anything to pay it with.

Q. Well, did you accept the bill or reject it?

A. If I remember correctly I told them if we were responsible we were protected by insurance, and if not we would not pay it; the ship would not pay it, something to that effect. I do not remember just what the conversation was.

Q. Well, what action did you take upon the bill of

(Testimony of W. F. Swan.)

the Alaska Pacific Fisheries when that was presented to you? A. That is the one I was talking about.

Q. That was the one. I was asking you about Horner's bill?

A. I told him too look to Mr. Burckhardt to pay it.

Q. When Burckhardt presented this other bill, you had this conversation with him, did you? [306]

A. Yes, sir, we had several different conversations in regard to it.

Q. Did you ever, at any time, agree to pay it?

A. No, sir.

Q. Did you ever have any negotiations or make any offers to settle that account? A. No, sir.

Q. Do you remember now, Mr. Swan, what this bill of Mr. Horner's covered?

A. I have only seen one bill and it amounted to something like \$4,200.00. I understood that it covered the total amount of charge for reconditioning the cargo in its entirety.

Cross-examination.

Q. (Judge HANFORD.) When the receipted bill was presented to you, can you recollect who made the presentation to you?

A. I do not remember that. I was under the impression that it came through the mail.

Q. Were you the active manager of the "Jeanie" during the time she was chartered to you?

A. Most of the time, yes, sir. I was away for a couple of weeks in Alaska one time; the balance of the time I was there all the time.

Q. Did you send the order to Captain Corby that

(Testimony of W. F. Swan.)

was received at Chilkoot and Yes Bay and Chomly, to bring down that salmon? A. I think I did, yes.

Q. That was on the request of Burckhardt, or some one [307] representing the Alaska Pacific Fisheries, was it? A. Yes, sir.

Q. To bring out their goods? A. Yes, sir.

Q. Did you give any special instructions to the captain about how to care for or handle the goods?

A. No, sir.

Q. Were you present here in Seattle immediately before or at the time the "Jeanie" went on her voyage north, that same voyage?

A. Yes, I was here at that time.

Q. You inspected the "Jeanie" before she left Seattle on that voyage to determine her seaworthiness or unseaworthiness? A. I did not, no, sir.

Q. Do you know if anyone else gave her an inspection immediately before she started on that voyage?

A. No, I do not know that I do.

Q. You relied upon the captain to report to you if there was anything that needed attention in regard to the condition of the ship?

A. The captain and his officers.

Q. Because they make requisitions for anything needed to be done and you assumed she was all right?

A. They had instructions always to report anything that was necessary to be done to the ship and keep her in condition to handle the cargoes. [308]

Redirect Examination.

Q. (Mr. BOGLE.) How long, Mr. Swan, does

(Testimony of G. L. West.)

it usually take the "Jeanie" to make a round trip to Alaska?

A. A voyage of 20 to 25 days, depending entirely on where she went.

Q. Has it been your custom in the steamship business to inspect or have an inspection made of your vessels engaged in short coast voyages, previous to the commencement of each and every voyage?

A. Oh, I always went down and went aboard, looked around. It was not a matter of inspection in regard to the vessel's seaworthiness, I would not be capable of that; I am not experienced enough in ship-building to state whether a vessel is seaworthy, but I inspect the vessel in regard to general up-keep, etc., cleanliness.

Q. But I say in these short coast voyages is it customary to have an inspection made before each voyage?

A. I never heard of any such thing.

Q. Is it the custom, when she receives the proper overhauling, at the proper time of year, to rely upon the master's reports?

A. Yes, sir; the master and other officers; I depend entirely on them.

(Witness excused.) [309]

[Testimony of G. L. West, for Claimant (Recalled).]

G. W. WEST, recalled, testified on behalf of the claimant as follows:

Q. (Mr. BOGLE.) What is your business?

A. Insurance adjustments.

Q. With what company are you connected?

A. Mather & Company.

(Testimony of G. L. West.)

Q. Insurance brokers?

A. Yes, sir; and adjusters.

Q. How long have you been engaged in that business, Mr. West?

A. About eight years; six to eight years.

Q. Were you connected with Mather & Company in that business in December, 1912? A. Yes, sir.

Q. And also in January, 1913? A. Yes, sir.

Q. Mr. West, were you present at the Virginia Street dock at the time this meeting was held between the two Burckhardts representing the Alaska Pacific Fisheries, the owner of the salmon, Mr. Dawson for the charterers of the "Jeanie," and Mr. Hall of the dock company? A. I was.

Q. I wish you to state, Mr. West, in what capacity you attended that meeting, whom you represented, and what your interest was?

A. Well, it was our duty to report to the underwriters the general run of things happening in connection with the companies and keep them advised, in other words, of all progress being made and all the details. We have no direct authority.

Q. Had your office placed any insurance on the "Jeanie" cargo? [310]

A. We placed what we call protection indemnity insurance.

Q. You placed no cargo insurance?

A. Well, it does not cover cargo generally; it only covers certain instances.

Q. You placed no straight cargo insurance on the "Jeanie's" cargo, did you? A. No.

(Testimony of G. L. West.)

Q. To what extent did you represent the insurance companies, Mr. West?

A. It is usual to keep them advised if any claim is going to be made on account of certain accident or disaster of any kind, and to tell them as much as we can about the case. And keep them informed generally.

Q. Is your agency such that you have any authority to act for or bind the underwriters?

A. It is not.

Q. I wish you would state, in your own way, Mr. West, what took place at this conference on the Virginia Street dock.

A. It was my understanding that everybody was agreeable to have Mr. Horner do the work of reconditioning the cargo that had been set aside, and the question of liability to be determined afterwards; that was my understanding of the meeting.

Q. What cargo do you refer to?

A. I refer to some 2100 cases, near that amount, that had been set aside; that was my understanding of it.

Q. Set aside for what purpose?

A. As being damaged.

Q. And the balance of the cargo was where?

[311]

A. It was in the dock, I think, in the Virginia Street dock. I really do not know.

Q. Did you, at that time, know that any of the other cargo had been damaged?

A. I knew that there was supposed to be 1200 cases

(Testimony of G. L. West.)

on the dock somewhere around, and 900 cases in the warehouse, damaged.

Q. Is that the cargo concerning which you testified that the parties agreed that Mr. Horner should recondition? A. That was my understanding.

Q. Was it your understanding at the time of that agreement that the parties agreed that Mr. Horner should agree to do anything with reference to the balance of the cargo?

A. Nothing was said, to my knowledge.

Q. Did you at that time know that there was any damage to the balance of the cargo? A. I did not.

Q. Did any of the parties mention any damage to the balance of the cargo?

A. Not to my knowledge.

Q. Was any claim ever made to you, as representative of the underwriters, by the Alaska Pacific Fisheries, for any of this damage? A. There was not.

Q. Was your agency such that you had authority to accept or act on any claim made by parties for damaged cargo?

A. Not other than to report on it and remark on it as we saw fit.

Q. I mean as to binding the Underwriters?

A. We have no authority whatever. [312]

Q. Did Mr. Horner ever present your office with a copy of his bill? A. He came in himself, yes.

Q. What did you do with reference to that bill?

A. Told him we had nothing to do with it.

Q. What did you tell Mr. Horner?

(Testimony of G. L. West.)

A. We told him that Mr. Burekhardt would have to pay that bill.

Q. Did Mr. Burekhardt or the Alaska Pacific Fisheries ever, prior to that time, or at any later time, make a claim against you or present you with a claim? A. Not to my knowledge.

Q. Do you remember about what time Mr. Horner came in with this bill?

A. No, but I presume it was along about the latter part of March or the first of April; two or three months after the "Jeanie" arrived.

Q. Do you remember now what this bill covered?

A. Reconditioning entire cargo.

Q. Had you had any previous knowledge or any previous notice that the balance of this cargo had received any damage? A. No.

Q. Or that the Aalska Fisheries would make any claim on account of damage to the balance of the cargo? A. No.

Q. Mr. West, were you at the dock when the "Jeanie" arrived, or shortly thereafter?

A. I was there when she arrived; as a mater of fact, I was on her, I boarded her at a different dock.

[313]

Q. Before the hatches were opened up?

A. Yes, sir.

Q. Did you notice how her hatches were secured, or did you pay attention to it?

A. Yes. Do you want me to tell?

Q. Yes.

A. There were three tarpaulins and the usual

(Testimony of G. L. West.)

planking they put over, and this planking was corked.

Q. Were you there when the hatches were opened up? A. I was.

Q. Did you remain there while the cargo was being unloaded? A. I did.

Q. I wish you would state, Mr. West, the condition of that cargo as it came out of the forward hatch.

A. Directly under the hatch, about six hundred cases were wet, under what we call number 1 hatch.

Q. And did you notice any damage to cargo on the forward part of the ship?

A. Yes, sir. After we got further down in the hold of the ship, we found in the extreme forward end of the lower hold, what they call the between decks, more or less damage, I estimated about eight hundred cases; these figures are not exact, because I only estimated them.

Q. I wish, Mr. West, you would draw a little diagram to illustrate where this other salmon was located on the "Jeanie."

A. (Witness does so.) This is supposed to be number 1 hatch.

Q. Mark that No. 1 hatch. Where was the cargo that was damaged, under the hatch?

A. It was right out flush with the top of the hatch.
[314]

Q. Mark that with an X.

(Witness does so.)

Q. About six hundred cases there.

A. Yes, sir, about six hundred cases there. I only

(Testimony of G. L. West.)

took a certain number as they were swinging them out. I did not take an actual check.

Q. Indicate on that drawing where the other damaged salmon came from?

(Witness marks point with letter Y.)

Q. Now the two points that you have marked Y, how far forward is that of number 1 hatch?

A. I would say about thirty or forty feet. I really do not know; you could tell that from an actual measurement.

Q. Was there any water in the "Jeanie" at the time these salmon were taken out, so that you could trace as to where the water came from?

A. Well, the bulkhead was very wet, where they put the anchor chains; there is a bulkhead forward of the forecastle.

Q. (Judge HANFORD.) That bulkhead was wet?

A. It was damp more or less.

Q. (Mr. BOGLE.) What is that line you have running through there? A partition?

A. That is the bulkhead.

Q. Now, Mr. West, was there any salmon loaded forward of this forward bulkhead? A. No.

Q. Was there any salmon damaged between this number 1 deck and the deck—the next below deck?

A. There was no salmon in that. [315]

Q. Any cargo in there at all?

A. This was divided off. There is a little place where they keep the rope and stuff like that on part of that deck, right in there.

(Testimony of G. L. West.)

Q. Now, coming down to this second deck, for how great a distance aft of the bulkhead was the salmon damaged?

A. In this particular part not very far, I would say maybe two tiers.

Q. Two tiers aft? A. Yes, sir.

Q. Now, in the hold, how far back did the damaged salmon go?

A. Well, there was back eight or ten tiers opposite that; might not make that much, because there was a hatchway in there and it ran directly under that.

Q. Was this damaged salmon in this between decks and the lower hold, near the middle of the ship or was it over toward the skin of the ship?

A. Right in the middle, most of it.

Q. Now take this between decks and come back aft toward No. 1 hatch, was the salmon as you went aft of the two tiers back to the point underneath No. 1 hatch damaged?

A. After you got out these wet cases directly under the hatch, it was all dry under that.

Q. I mean forward of the hatch and aft of these two tiers, was that damaged?

A. That was all dry.

Q. Now, going into the lower hold, was this salmon aft of these damaged salmon next to the bulkhead and forward of the hatch damaged?

A. No. [316]

Q. In this latter deck, immediately under the main deck, was there any salmon located there?

A. Yes, up to the second point, up to this locker

(Testimony of G. L. West.)

there that is built in, there is a bulkhead in there.

Q. And aft of this locker—you had better mark these decks A, B and C so that we can identify them.

(Witness does so.)

Q. B is the deck I have reference to as between decks and C is the lower hold. A. Yes, sir.

Q. Now, on the deck marked A, from the point forward of the opening of No. 1 hatch, aft of this rope locker, was any of that salmon wet?

A. Not that I saw.

Q. You say there were about 800 cases along that bulkhead and about 600 cases under the hatch, which were wet; about 1400 cases. Do you know where the balance of the wet salmon came from?

A. I do not.

Q. Did you see it taken out of the ship?

A. I saw everything out of the forward part of the ship.

Q. Was all of the damaged salmon you saw in the forward part of the ship; did it come from these two places? A. Yes, sir.

Q. Did you watch the salmon come out of the aft part of the ship? A. I did not.

Q. Do you know what condition it was in?

A. It was reported to be in good condition.

Q. Is that the reason you did not bother? [317]

A. No.

Q. Who reported that to you?

A. I think the first mate did, he was the officer of the boat.

Mr. BOGLE.—I offer this diagram in evidence as

(Testimony of G. L. West.)

explanatory of the testimony of Mr. West.

Diagram marked Claimant's Exhibit 5, filed and returned herewith.

Q. Mr. West, did you notice any of this salmon damaged by coal-dust? Any of the boxes?

A. I noticed the top boxes in the forward hold seemed to show signs of coal-dust.

Q. How about the cases underneath the hatch?

A. They did not.

Q. Did you see any cases of salmon which showed any evidence of coal-dust whatever from any portion of the ship except in the hold next the bulkhead?

A. Well, part of it showed the coal-dust was not the part next to the bulkhead.

Q. Where was that located?

A. That was about amidships; just a little coal-dust on the top of the cases.

Q. Was that dry or wet? A. Dry.

Q. Was that about amidships under the main hatch or forward of the main hatch?

A. Just forward of the main hatch, what they call number 1 hatch. I am not sure whether they call it main or just what they call number 1 hatch.

Q. You say just forward. How far forward, Mr. West? [318]

A. Well, now, I would say it was pretty near up flush with the main hatch. That is up along the line of the forward part of the main hatch. Maybe two or three feet back there along the hatch.

Q. Did it extend much more than two feet?

A. It did not extend out under the hatch.

(Testimony of G. L. West.)

Q. That was forward of the opening?

A. Yes, sir.

Q. What I am trying to get at is, how far forward of the opening.

A. It was not over two or three feet. I don't know exactly how far it was; it was dry and for that reason I paid no further attention to it.

Q. You do not know from what cannery that salmon was loaded what grade or what brand it was?

A. Not for sure. I know what the mate said, it was from one cannery. He had it all chalked. He marks it with an X right down the tier, and it showed that was the end of it.

Q. You do not know yourself?

A. No, I don't know that.

Mr. BOGLE.—I have reports of survey made by Gibbs and Walker of the "Jeanie" for June and July, 1912. I would like to offer them in evidence without having to bring the witnesses to prove them.

Judge HANFORD.—I object as incompetent and immaterial, because *and* repairs or inspection made in July or August would not affect the question of seaworthiness in December or January.

Mr. BOGLE.—You are willing that they shall go in evidence without formal proof, subject to your objection?

JUDGE HANFORD.—Yes. I object on the ground that anything shown [319] at that time would not be material as to the showing the handling of the cargo on this voyage.

Papers marked Claimant's Exhibits 6 and 7 re-

(Testimony of G. L. West.)

spectively, filed and returned herewith.

Q. Mr. West, at the time you made the examination what was the condition of the deck, particularly along the main deck and the extreme forward part of the ship?

A. It showed signs of having had water in.

Q. Was there any water running out of it at the time? A. No.

Q. The deck I indicate is marked D. That had signs of being wet, had it? A. Yes, sir.

Q. Mr. West, did you make any estimate of the proportionate amount of the 2,200 damaged cases, that was damaged by coal-dust?

A. Not to anyone, except I might have made an estimate in my own mind.

Q. You watched all that cargo come out, did you?

A. Yes, sir.

Q. What proportion would you say was damaged by coal-dust and what proportion by water?

A. Well, as I say, I did not state these estimates to anyone but I think about 15% was coal-dust.

Q. Showed some coal-dust damage?

A. Yes, sir.

Q. And the balance showed what?

A. It was wet.

Q. Well, was it entirely water-damaged?

A. Well, it was all wet practically. [320]

Q. Was it all water-damaged? A. Yes, sir.

Q. As distinguished from coal-dust?

A. Some were wet with coal-dust too, you know.

Q. Can you give us an estimate of the amount that

(Testimony of G. L. West.)

was damaged solely by water and the amount that was damaged solely by dry coal-dust, and the amount that was damaged by water and coal-dust?

Judge HANFORD.—I object, merely an estimate would not be of value in the case unless there was an accurate record made by count.

Mr. BOGLE.—I supposed that Mr. Horner had made an accurate count but he was unable to give us that. The best I can get at it is an estimate of a man who was present at the time it was being taken out. You can go ahead and answer the question, if you can.

A. I should say fifteen per cent would be coal-dust.

Q. You mean dry coal-dust?

A. Yes, sir. Most of the balance showed wet, and I could not make any division as to wet only and wet with coal-dust, because I just saw that they were wet. As a matter of fact I did not examine closely.

Q. You could not tell whether the balance had coal-dust damage or how much coal-dust damage.

A. No.

Cross-examination.

Q. (Judge HANFORD.) Did you keep any watch of the proceedings in reconditioning the cargo in the warehouse there? A. I did not. [321]

Q. You do not know as a matter of fact how many damaged cases were actually found to be damaged when they were doing the work of overhauling the entire lot? A. No.

Q. Do you know whether any cases were damaged that were in the hold of the ship, nearest the bottom,

(Testimony of G. L. West.)

the hold next to the floor?

A. You mean what part of the ship?

Q. Any part of the ship, forward or aft?

A. In the extreme forward part of the ship they were wet.

Q. These same cases that were the lowest down at the bottom of the pile were wet? A. Yes, sir.

Q. Next the floor?

A. Yes, in the extreme forward part of the vessel.

Q. Was there anything which indicated to you how the water got in the ship?

A. I cannot say how it got in. I can say how I thought it got in.

Q. Was there any sign of any misplacement of planks or openings of seams or anything of that kind? A. I did not see any in the hold.

Q. About the deck, did you see anything of that kind, any open seams or broken planks?

A. The extreme forward, over the anchor—I don't know what they call that, whether they call that the anchor hold or not, the seam showed where there was cracks in the seams.

Q. That was the extreme peak end, forward end of the vessel? A. Yes, sir.

Q. That is forward of this bulkhead where the salmon was? [322] A. Yes, sir.

Q. When the hatch was taken off, when you found these wet cases under the hatch, were the tarpaulins wet on the inside?

A. Everything was wet on top of the hatch, yes.

Q. The hatch cover, that is the plank covers, did

(Testimony of G. L. West.)

they seem to be all right or were they in a damaged condition? A. They seemed to be all right.

Q. Can you recollect any particular thing that was said when the agreement was made for Horner to recondition the damaged goods, by any one there in that conference? Can you recollect any particular thing that was said?

A. I recollect that it was a general agreement made that Horner should do the work on the 2,100 cases; that was my understanding.

Q. Your understanding of this. That is what I am trying to get at, if anything was said to justify you in assuming that his employment was limited to any particular number of cases or whether it included the damage to the cargo?

A. We only talked about the damaged cases.

Q. Who, if any one, made any remark about the number of cases being 1200 or 900 or 2,100?

A. We were standing by the most of them and they were referred to as damaged cargo. Nobody said anything about how many cases there were.

Q. As a matter of fact there were some wet cases on the dock and some cases inside the dock that were known or believed to be damaged?

A. Yes, stood aside in the warehouse.

Q. You never supposed that the insurers that you represented [323] would be liable for this damage under any policies issued? A. I did what?

Q. You never supposed the insurance companies that you represented were liable for this damage on any policy that they had issued?

(Testimony of G. L. West.)

A. Only liable in so far as the "Jeanie" was liable.

Q. That is the owner or charterer?

A. Made us liable when the "Jeanie" was liable.

Q. The owner or charterer had insurance that you had to look out for to pay?

A. They might have to protect them; it was a question, and still is.

Q. The owner or consignees had no insurance that gave rise to liabilities?

A. I do not know anything about his insurance.

Q. Well, Mr. Bogle questioned you about any claim being presented. The Alaska Pacific Fisheries or the consignees of this cargo had no insurance that would be a basis for a claim that they would present to you?

A. They had no insurance with us at all, that is the consignees.

Redirect Examination.

Q. (Mr. BOGLE.) The insurance which you placed was to protect the owners of the "Jeanie," was it not? A. Yes, sir.

Q. What is commonly known as protection and indemnity insurance? A. Yes, sir.

Q. And if the owners are, the underwriters are liable under [324] these policies?

A. In most cases they are liable.

Q. Mr. West, was there any way, without going into the locker, called the anchor locker, that the water could get into the place where the salmon was?

A. I did not see where it got in, but evidently it did get in in some way. That is the way I thought

(Testimony of G. L. West.)

it got in. I cannot say positively how it got in, but I know that is the way it looked.

Q. That was at the side of that bulkhead?

A. Yes.

(Witness excused.)

Hearing adjourned. [325]

Seattle, Washington, November 13, 1914.

Present: Mr. LAWRENCE BOGLE, for the Claimant.

Judge C. H. HANFORD, for the Libelant.

[Testimony of Max Gunther, for Claimant.]

MAX GUNTHER, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. BOGLE.) You are a sea-faring man, are you, Mr. Gunther? A. Yes, sir.

Q. What papers do you hold?

A. Mate's papers, chief mate's papers.

Q. How long have you been a sea-faring man?

A. I have been ever since I was 16 years old; I am thirty-three now. Seventeen years.

Q. At the present time you are mate of the "Admiral Evans"? A. Yes, sir.

Q. What is your run?

A. Up to southwestern and southeastern Alaska, as far as Kadiak.

Q. How long have you been running to Alaska?

A. About ten or twelve years—ever since 1900.

Q. What position did you hold on the "Jeanie" in the year 1912? A. Second mate.

Q. How long were you on the "Jeanie"? Altogether? A. I think about two years.

(Testimony of Max Gunther.)

Q. Commencing about what time and ending about what time?

A. I do not remember exactly what time I did start in. I was in her until the time she was wrecked, that was last year, in the summer of 1913 when she was wrecked, [326] that is when I left her. I think I was in her altogether not quite two years. I think I was in her from February until the next February, and then until in December when she was wrecked. That is about eighteen months, a little more, maybe twenty months. From February to February is one year and then until December.

Q. About twenty-two months? A. Yes, sir.

Q. Was she on the Alaska run during all that time? A. Yes, sir.

Q. Now, you were on her in December, 1912?

A. Yes, sir, that is right.

Q. That is the voyage, Mr. Gunther, on which she brought this salmon down from Alaska?

A. Yes, sir.

Q. You remember that voyage, do you?

A. Yes, sir.

Q. Mr. Gunther, what condition was the "Jeanie" in when she left Seattle on this particular voyage?

A. She was in a seaworthy condition, in my opinion.

Q. She was a wooden ship, was she not?

A. Yes, sir.

Q. Now, on your voyage from Seattle north to Ketchikan and Juneau, did you encounter any unusually heavy weather, on the north-bound voyage?

(Testimony of Max Gunther.)

A. North-bound voyage? No, sir.

Q. Did the "Jeanie" take any water on the north-bound voyage? A. Going up to Juneau?

Q. Yes. A. No, sir. [327]

Q. Any unusual amount of water, I mean.

A. No. Well, there was one day in Queen Charlotte Sound we had quite a little blow, a little rough weather, and she took over some water. I know when the captain came aft we were coming around one of the islands and it pretty near washed him off, but that was only a couple of hours.

Q. That was going north?

A. Yes, going across the Sound.

Q. Did she take any water into the ship itself?

A. No, no.

Q. Did she have any trouble taking care of the water with the pumps, going north?

A. No, not at all.

Q. Do these wooden ships always take on water?

A. They do always make a little water.

Q. Not any more than you can take care of with your pumps? A. No.

Q. Now, on your northbound voyage, do you remember the incident of stranding in Wrangell Narrows? A. Yes, sir.

Q. What was the extent of that stranding, Mr. Gunther?

A. Well, we just went on a mud bank on the other side of the buoy. We did not see the buoy until we got on the mud. It had started to snow and we missed the buoy, about I should say 200 or 500 feet,

(Testimony of Max Gunther.)

and we got on the left-hand side of the buoy and got on the mud flats.

Q. How long did she stay there?

A. We went on at five or six o'clock in the afternoon and went off again in the morning about two o'clock or half-past [328] one.

Q. Did you have any outside assistance to get off?

A. No, none at all. We just put an anchor out, a kedge anchor out, and then we hove tight so that the ship would not swing around when the tide turned; so when the water got high enough we started in and backed out.

Q. During the time you were resting on the mud bank, how were you resting? A. On an even keel.

Q. Was she in any way strained, that you could see? A. No.

Q. Did she take in an unusual amount of water after you got off this mud bank?

A. No, not that I noticed.

Q. Do you remember what your northbound cargo consisted of?

A. Consisted of coal and salt and other general merchandise.

Q. Do you remember how much salmon you took on at Chilkoot?

A. I think it was 10,000 cases or 14,000 cases.

Q. Where was that salmon stowed?

A. Stowed forward between decks and forward hold of the ship.

Q. Had there been any loose coal in the forward between decks?

(Testimony of Max Gunther.)

A. Not forward on the between decks.

Q. Had there been loose coal in the forward hold?

A. Forward hold, yes.

Q. Where was that coal unloaded?

A. At Juneau.

Q. What steps, if any, did you take to clean out the hold before putting the salmon in?

A. Well, first, we scraped it out—scraped it out with shovels, [329] then we cleaned it out and scraped it out again and then we cleaned it and swept it out again.

Q. What was the condition of the hold when you finished?

A. Well, it was as clean as we thought it was necessary to put in salmon; it was clean as it ever was.

Q. Could you get it any cleaner?

A. No, I could not get it any cleaner.

Q. How was this Chilkoot salmon stowed as to dunnage, the usual method of stowing?

A. Well, it was stowed as we always stow salmon; put dunnage underneath and dunnage in the wings to keep it away from the ship's sides.

Q. What sort of dunnage did you use underneath?

A. Well, in most places we did not have less than three inches and a half to four inches. I had big sticks 4x12 and 6x12 and put one on top of the other and then stowed the salmon on top of that.

Q. What dunnage did you use in the wings that

(Testimony of Max Gunther.)

you mentioned between the salmon and the skin of the ship?

A. We took one by six and stand that up and down to keep the salmon away from the ship's side.

Q. In your opinion, Mr. Gunther, was this salmon properly stowed?

A. Yes, it was properly stowed, in my opinion.

Q. Was it properly dunnaged? A. Yes, sir.

Q. Did you take any precautions to keep the coal dust from *fetting* on that salmon?

A. Yes, we took tarpaulins and sails, we had an old mainsail there and an old foresail on the ship that we did [330] not use, and an old jib, we had a new jib, and we covered the salmon all up, and we took the covers underneath them under the edges and nailed them and then took battens and nailed them fast on the side of the ship, so that there would be no possibility of dust getting in the salmon.

Q. Now, after leaving Chilkoot where did you go?

A. After leaving Chilkoot to Gypsum, tried to land coal there, but it was too rough and we could not get alongside the dock, blowing southeast, so we proceeded toward Sitka.

Q. Did you land at Sitka? A. Yes, sir.

Q. What did you discharge at Sitka?

A. Discharged coal at Sitka.

Q. Do you know how much coal you discharged?

A. I think 150 tons.

Q. Then you proceeded on your voyage. What was your *net* port?

A. Ketchikan, I think, was the next. When we

(Testimony of Max Gunther.)

went from Sitka to Ketchikan; we tried to go to Sulzer but it was too rough to make it.

Q. What weather did you encounter trying to go to Sulzer?

A. We had southwest wind, and we tried to go across to Cape Ommany, and we went inside and tried to go down Clarence Straits and got down as far as Merwin Sound and it started a southwest and snow and we concluded we would not go to Sulzer, it was rough enough there and if we had gotten outside it would have been still rougher.

Q. Going by way of Cape Ommany did you go in the open sea? A. Yes, sir. [331]

Q. How long were you in the open sea?

A. We started out one night and we had to turn back. It was so rough we had to turn back again. We laid behind Ommany that night and started out next morning. I think it was a day and a half outside before we got into Sitka.

Q. This rough weather you struck before you got to Sitka, was it?

A. Yes. Just a minute; I think it was a day and a half, I am not sure. We started away in the morning—yes, it was a day and a half or two days before we got into Sitka.

Q. During that time did the “Jeanie” take any water over her decks?

A. Yes, she took water over the forecastlehead and over the decks.

Q. Did she labor any in this sea?

A. She labored quite a bit.

(Testimony of Max Gunther.)

Q. Was there much sea running?

A. Yes, a big sea running for quite a while. It started to blow up and in fact we had her hove to that night, we could not steam against it and we could not turn back, so we hove her to.

Q. And lay there that night? A. Yes, sir.

Q. Did she strain any in that seaway?

A. Yes, sir, she strained quite a bit; that is, going up and down and yawing the same as a ship would.

Q. What effect does that have on a wooden vessel?

A. Well, naturally will open up the seams and weaken her a little bit.

Q. Did you notice any unusual amount of water at this time? A. In the bilges, you mean? [332]

Q. Yes, sir.

A. No. We kept on pumping all the time. You cannot tell exactly how much water there is in a ship at that time. I did not notice any unusual amount of water.

Q. Why cannot you tell?

A. You sound and probably get so much sounding and perhaps the water will not mark a foot in her; when you get a foot of water they keep the pumps going all the time, and she would suck one minute and the next minute she would pump.

Q. Why is that?

A. Well, the ship rolls and the water in the middle of the ship would be away up on her side between the knees and between the skin.

Q. Between the skin and the side of the ship?

A. Yes, sir.

(Testimony of Max Gunther.)

Q. Mr. Gunther, was it possible when a ship is rolling heavily in a seaway, to work the pumps properly so as to keep the water out of her bilges?

A. Well, you can work the pumps to a certain extent, like as I say.

Q. Can you work them so as to keep all the water out of the bilges?

A. No, you cannot keep it all out. One minute the pump will suck and the next minute it will be away up the side and you cannot get at that water. The only way to do is to keep on pumping whenever you can. You could not get all the water out of her, and the ship is never steady enough for the pumps to get at the water.

Q. And after your second attempt to get into Sulzer, you then went to Ketchikan, did you? [333]

A. Yes, sir.

Q. Then you unloaded the balance of your coal there? A. Yes sir.

Q. And from there, Mr. Gunther, where did you go?

A. I think we went to Yes Bay and loaded salmon there.

Q. And from there to Chilkoot? A. Yes, sir.

Q. Did you notice any damage to this cargo, prior to the time of leaving Ketchikan southbound, and, if so, when did you first notice the damage?

A. I noticed damage after we left Cape Ommany going to Sitka. I went down in the morning when it came quiet, to see how things were in the hold, after we got good weather. I came down in the lower hold

(Testimony of Max Gunther.)

and I found a plank alongside the keelson loose. The water had lifted the plank right up, a 2x12, and it was lying to one side and the water was coming out of the ship's hold and washing all over the hold.

Q. Was it getting on the salmon?

A. Getting on the salmon, yes.

Q. What caused that plank to wash up and become loosened?

A. The water being in the bilges and the ship rolling all the time, lifted that heavy board up, drewed the spikes out.

Q. Were you working your pumps all this time to keep the water down?

A. We were working the pumps whenever it was necessary. We would sound every two hours and if we thought—sometimes you put the sounding rod down and you have two or three inches of water or six inches and in five minutes if you put it down again you probably have a foot. You could not [334] see much water. And the only way to do is to put the steam on the pump and pump away as long as there was any water coming out.

Q. That, I understand, was because the ship was rolling? A. Yes, sir.

Q. Was that what caused the plank to come loose?

A. Yes sir, that was what caused the plank to come loose.

Q. Now, Mr. Gunther, did you have charge of securing the hatches at the time you left Chilkoot and also when you left Ketchikan?

A. Yes sir, I looked after the securing of the

(Testimony of Max Gunther.)

hatches. I was right there when it was done.

Q. Explain how these hatches were secured.

A. Well, they are 2x12, they were put on; there was a wedge driven on the end, that drove them right close together; then between the cracks of the hatches and they were calked with oakum.

Q. What do you mean by between the cracks of the hatches?

A. Here is a 2x12, you put one on here and another one here, and so on, and between these cracks we put oakum.

Q. That does not get into the record. You mean across the open hatches you would put boards?

A. No, we put the hatches on. We put the hatch covers on after that. First calked the hatches with oakum, and then put three tarpaulins over that.

Q. I mean, what do you calk with oakum, the hatch covers?

A. No, calked the hatches, the cracks between the hatches.

Q. By hatches you mean boards that go across the hatch?

A. Yes, boards we call the hatches. The hatches were 2x12 and they are laid right alongside of each other; it took [335] fifteen or sixteen to cover the hatch.

Q. To cover the hatch opening? A. Yes, sir.

Q. And you say they were all calked with oakum?

A. Between the hatches was oakum stuck in and drove down with a calking iron and on the ends of the hatches.

(Testimony of Max Gunther.)

Q. What else did you do?

A. Put on three tarpaulins and battens on the side and put wedges in so that they could not blow out; and put iron hatch battens over the hatches.

Q. Were all the hatches secured in that way?

A. They were all secured that way.

Q. Mr. Gunther, after the hatches were secured that way, was it possible for the water to get in through the hatches unless something works out?

A. No, not supposed to be any water get into them.

Q. Can it get in unless something works out, the oakum works out? A. No, it cannot get in.

Q. Now, after leaving Ketchikan southbound, I wish you would describe the condition of weather that you encountered?

A. Well, we ran into a heavy gale in the Gulf of Georgia, some weather like I never seen in my life before.

Q. How long were you in that gale?

A. Well, I should judge we were in there—it was my watch on deck when it started, and it lasted until about three o'clock, about seven or eight hours, the heaviest of it.

Q. Was there much of a wind?

A. Yes, the wind, there was such a wind that it brought up quite a bit of sea so the ship took quite a lot of water. [336]

Q. Took water over her decks? A. Yes, sir.

Q. About how hard was it blowing?

A. Well, I should think it was blowing over sixty miles an hour. It was a gale I never experienced in

(Testimony of Max Gunther.)

the Gulf of Georgia, and as far as I know nobody else aboard ship ever saw it blow as hard as it did that day.

Q. How much headway did you make against it?

A. Did not make any. It was impossible to make any headway. The only thing we could do was to heave her to, to one side or the other to keep off the shore. One minute it would be blowing and raining and the next minute it would be snow or sleet. We did not know how much leeway the ship was making, and we would keep the ship about an hour on this tack and then get her on the other side, and keep her kind of drifting back in the same direction as we had been going.

Q. Was the ship working very much in this sea?

A. She was diving considerably and lying over on one side. She would roll over on one side and then dive right into it.

Q. What would be the effect of that on a wooden ship?

A. I think it will strain a wooden ship considerably.

Q. Would it have a tendency to open up the seams?

A. Yes, sir, it would have a tendency to open up the seams.

Q. Did she take an unusual amount of water during that blow?

A. Yes, she took a lot of water forward, close to the forward hatch, and took considerable water over the forecastle, too.

Q. Do you know whether she took any water into

(Testimony of Max Gunther.)

the ship itself down the bilges or into the cargo?
[337]

A. No, I don't think she did. I didn't notice any. We did not open up anything in weather like this; we left things closed.

Q. You do not know whether she opened any of her deck seams or not, do you?

A. No. I did not notice anything, but I think she might have opened up her decks; because you could not see by looking at the decks whether the seams were open. Ships work up and down and it is liable to get water in without you seeing it. A ship does not open up so that you could see anything, anything like that.

Q. Did you have some trouble in keeping the water out of the bilges as you were coming into Sitka off Cape Ommany, when the ship was rolling so hard, was it difficult to keep the water out?

A. Yes, the ship lying over on one side once and then over to the other side when you put her on the other tack.

Q. Do you know whether or not any of this water which was between the skin and the side of the ship was blown out as it would roll up the side when lying over?

A. Yes, it naturally would blow out through the side of any crack, that was not dry or very tight, a ship rolling like that, water will wash, and the ship rolling over it will slop in against the side, slop up against the side and in any little crack it will slop through there.

(Testimony of Max Gunther.)

Q. That would go through the cracks?

A. Yes, naturally would.

Q. Do you remember when you arrived at Seattle?

A. I think it was the 16th of January, somewhere around there. [338]

Q. You haven't any date definite in your mind?

A. No.

Q. You do not remember when you started on the voyage or any of these definite dates, do you?

A. No.

Q. You could not testify to that accurately?

A. No.

Q. You do not remember the date you left Ketchikan? A. No, I could not remember that.

Q. Do you remember how long it took you from Ketchikan to Seattle?

A. I think it was between four and five days, if I am not mistaken.

Q. Did you see the extended protest that was filed on arrival at Seattle? A. No, I have not seen it.

Q. Were you at the dock when this salmon was unloaded? A. Yes, sir.

Q. Did you have charge of taking off the hatches?

A. Yes, I was the one that took off the hatches.

Q. When these hatches were taken off, Mr. Gunther, was any of the oakum worked up from the hatches?

A. No, we had to take hooks, the sailors took hooks, the hatches were so tight, you know, that we had to take a bar and stick in and break them up, and then we took the hooks and pulled the oakum out.

(Testimony of Max Gunther.)

Then after we got one hatch broke out up from underneath, then we broke off all the hatches.

Q. Did you notice any damaged cargo discharged from the "Jeanie"? [339]

A. I noticed salmon that was wet, cases.

Q. Where did that wet salmon come from?

A. There was quite a little in the lower hold that was wet, and some of it right close to the hatch underneath the deck.

Q. Was that near the forward part or aft part?

A. Forward hatch.

Q. How was this vessel trimmed when she left Ketchikan?

A. I think she was about three feet by her stern.

Q. Do you know how this cargo in the forward part of the hatch was wet, did you notice where the water came from?

A. Why, yes, the water came in through the deck right close to the hatch, near the hatch coaming, that is where it came in.

Q. Forward part of the hatch?

A. Yes, along the sides, along the hatch coaming.

Q. Is that where the seams would open up?

A. Yes, sir.

Q. Did you notice any damaged salmon or wet cases coming out of the after hatch?

A. No, I didn't notice any coming out of the after hatch.

Q. Did you notice any water coming out of the anchor locker as you were unloading?

A. There was water got into the anchor locker—

(Testimony of Max Gunther.)

when we were unloading .

Q. Did you notice any water coming out of there?

A. No.

Q. Did you notice any water at any time in the anchor locker?

A. Yes, there was water in there.

Q. Where was that? [340]

A. That was on the way to Sitka. And also some water that was in there when we were in the Gulf of Georgia.

Q. Where is that anchor locker?

A. It is right forward, on the bow.

Q. Right in the bow? A. Yes, sir.

Q. How would the water get in the anchor locker?

A. Well, a ship going up and down she will strain forward and the water will go in the seams.

Q. Was there any way that water could get in the anchor locker unless it went through her seams?

A. No.

Q. Do you remember where the cargo from Yes Bay and Chilkoot was loaded aboard the "Jeanie"?

A. Some loaded aft and some loaded forward.

Q. In the forward hold or between decks?

A. Forward lower hold, at Yes Bay and Chomly, both places.

Q. Where was the Yes Bay and Chomly salmon?

A. Forward and aft part of the ship.

Q. Any in the forward between decks, if you remember?

A. Yes, it was loaded forward between decks, too, because it was only half full when we left Chilkoot

(Testimony of Max Gunther.)

and the ship was fully loaded when we left Chomly.

Q. Was there anything the matter with your pumps when you left Seattle? A. No, sir.

Q. Was there anything the matter with the pumps when you left Juneau or Chilkoot?

A. No, sir. [341]

Q. Or Sitka? A. No, sir.

Q. Or Ketchikan, southbound? A. No, sir.

Q. Did you keep any record of the amount of damaged salmon? A. No, I did not.

Q. Who unloaded the salmon at the dock?

A. There was a 'longshore boss by the name of Morrison, he looked after the 'longshoremen, Al Morrison.

Q. Who was he working for, the ship or the owner of the salmon?

A. I think he was working for Swan; he unloaded the boat for Swan. He got the longshoremen together when we came into port. I would not know the longshoremen and I would not have time to go around. He collects the men and keeps their time so that we can pay them off.

Q. Mr. Gunther, your experience in navigating in Alaskan waters in the summer and winter, have you ever on any vessel encountered as severe weather as you did on the "Jeanie" this trip?

A. No, I have not. The weather we encountered on the "Jeanie" on that trip is more so than I have seen in a long time since I have been going to sea. We had one blow after another, and it seems to me that the elements were against us on that trip and

(Testimony of Max Gunther.)

if we had turned around and went the other way the wind would have turned around and went the other way too.

Q. Was the weather you encountered on that trip, the weather that you would reasonably expect to encounter in Alaskan waters in the winter? [342]

A. No, not that kind, not as heavy weather as we encountered that trip. We did not expect anything like that. We only get weather like that once in ten years or six years. We do not encounter weather like that every winter. I have been going to sea in the winter time and I have seen heavy winds blowing but I never seen anything like that that we had that trip.

Cross-examination.

Q. (Mr. HANFORD.) What was the usual time that it took the "Jeanie" to come from Ketchikan to Seattle, in ordinary weather?

A. The amount of hours, you mean?

Q. Well, hours or days, approximately the average time?

A. Well, we used to average about seven or eight miles an hour.

Q. Well, I want the time in days or hours that she would make that run. I do not know the number of miles from here to Ketchikan.

A. I will have to figure it out myself.

Q. What is the distance? A. 657 miles.

Q. Well, the average time in ordinary weather was seven and a half—

A. Seven and a half or eight miles.

(Testimony of Max Gunther.)

Q. You mean land miles or knots?

A. Nautical miles.

Q. You cannot remember the date that you left Chomly? A. No, sir, I cannot.

Q. You do not remember even the exact date you arrived at [343] Seattle? A. No, sir, I do not.

Q. The coal cargo that you carried going north that was dumped in the ship in bulk? A. Yes, sir.

Q. It the lower hold?

A. In the lower hold and also between decks; after the lower hold was full we put a little in the between decks.

Q. The lower hold was full of coal?

A. Full of coal.

Q. And some more in the between decks. And then the only other cargo she carried north was salt?

A. Salt and a little general merchandise.

Q. A little general merchandise. At what port did you discharge this coal? Did you discharge it at all at one place or carry it along to different ports?

A. No, sir; discharged some at Juneau, some at Sitka and some at Ketchikan.

Q. From Juneau you went to Chilkoot?

A. Yes, sir.

Q. And took in the salmon there that you brought to Seattle from Chilkoot? A. Yes, sir.

Q. Where was that stowed?

A. The salmon forward was from Chilkoot.

Q. Yes.

A. It was stowed in the forward between decks and the forward lower hold.

(Testimony of Max Gunther.)

Q. Was there at that time part of the coal cargo still remaining in the lower hold and also in the between [344] decks? A. Yes, sir.

Q. Did you discharge any coal at Chilkoot?

A. No, sir; not that I remember. Sometimes we go to a cannery and they want a ton or so and we give it to them. I would not say but what we done that there also, but I do not think we did. Coming up in the winter-time to a cannery and they want a ton of coal we give it to them, but I do not think we did; I do not think we did that trip.

Q. Before taking in the salmon at Chilkoot, was any part of the space in which that salmon was stowed entirely cleared out of coal?

A. Yes, it was all clear of the coal.

Q. Clear of all coal in that particular space?

A. Yes, in fact, there was no coal in the forward between decks when we put the Chilkoot salmon—there was never any coal there. The only coal we had in the between decks was on the aft part, a little bit.

Q. Was there any bulkhead forward where you put the salmon between that and the coal that remained in the ship? A. No, sir; there was not.

Q. Where did you go from Chilkoot?

A. From Chilkoot we went to Gypsum—tried to run there and it was too rough, so we proceeded over to Sitka.

Q. And encountering rough weather you were delayed in arriving at Sitka? A. Yes, sir.

Q. How was this Chilkoot salmon protected from

(Testimony of Max Gunther.)

coal-dust at [345] the time you were putting it in the ship?

A. How was it protected from coal-dust?

Q. Yes. There were no bulkheads between there and where the coal was?

A. We put covers over the salmon, old sails and a lot of covers; we nailed the pieces at the top against the beams and the sides were battened, so that there was no coal-dust could get at the salmon.

Q. That was after the salmon was in, but while taking it in was there any protection against coal-dust?

A. There was no dust blowing at the time, we did not touch the coal; the coal was away back from where we were stowing the salmon; it was not anywheres near the salmon.

Q. Was the ship lying still?

A. The ship was lying still alongside the dock; no dust floating at all.

Q. Did the crew of the "Jeanie" handle the salmon in loading, take it out of the warehouse and truck it aboard the ship? A. Yes, sir.

Q. The ship lay right at the dock, and the warehouse was on the dock, and it came out of the warehouse into the ship?

A. Yes, sir. The salmon was stowed quite a ways from the warehouse.

Q. How far? A. From the cannery?

Q. How far, how many feet from the opening in the warehouse? A. You mean at Chilkoot?

Q. Yes. To the sides of the ship.

(Testimony of Max Gunther.)

A. You mean the open space between the ship and the warehouse? [346]

Q. Yes, the cannerymen say it was about fifty feet. Do you think that is about right, across that wharf, about fifty feet?

A. Yes, about 50 to 100 feet; I could not say exactly.

Q. You would not want to say it was more than fifty feet?

A. I have not been in Chilkoot for quite a while, I do not know just exactly how the warehouse lies. You go to so many places and you can hardly remember exactly the distance.

Q. Now, when the ship was rolling and pitching in this rough weather going to Sitka, how was that salmon in the ship protected from coal-dust then?

A. It still had them covers on.

Q. These sails that you used for covering.

A. Yes, we kept them on right along, never took them off.

Q. Where were they taken out?

A. They were taken out when we started to load salmon at Yes Bay. They were nailed fast and kept there.

Q. Where was the last of the coal cargo discharged? A. At Ketchikan.

Q. Was that after you had completed taking in the cargo of salmon at Yes Bay?

A. After we completed taking in salmon at Yes Bay.

Q. Those you took at Chomly and Yes Bay?

(Testimony of Max Gunther.)

A. Yes, we took coal out first at Ketchikan.

Q. You took the coal out at Ketchikan, then did you go to Chomly? A. I think Yes Bay.

Q. The coal was all out of the ship before you went to either of these places? [347] A. Yes, sir.

Q. During the time the ship was laboring in heavy weather before you got to Sitka, did you discover this loose plank?

A. Yes, during the time on our voyage from Gypsum to Sitka I discovered that loose plank in the lower hold, the lower forehold of the ship.

Q. Was there any cargo of coal or anything else down in that hold above that plank?

A. Yes, there was coal in the hold too but it was away back of that in the aft part.

Q. This loose plank was in the forward part of the ship?

A. No, it was right in the middle of the hatch.

Q. And the coal was in the aft part of the hold?

A. Yes, the coal was in the aft part of the hold.

Q. And this loose plank was in the clear space between? A. Between the salmon and the coal.

Q. Was it a rotten plank?

A. No, it was not a rotten plank.

Q. Had it been well spiked?

A. Yes, it was well spiked. I don't know how many spikes there was, they were all sticking in the plank and the plank just lifted up and was lying to one side like it had rolled away, and the water was washing out of the bilges all over.

Q. And the spikes that were in the plank what

(Testimony of Max Gunther.)

were they driven into? Were they driven into the frame of the ship? A. Yes, sir.

Q. The beams or cross-beams?

A. I guess it was the knees or cross-beams. [348]

Q. Were they rotten?

A. Not that I know of. I spiked the plank in again and it held; it was put back again in the same place and it held.

Q. When you were stuck in the mud going through Wrangell Narrows, was that plank underneath the coal cargo?

A. Yes, it was underneath the coal cargo then.

It did not have the same vacant space there?

A. No, it was full of coal at that time, in Wrangell Narrows.

Q. After the coal was taken out and when you cleaned the ship, did you notice anything the matter with that plank?

A. I did not notice anything the matter with the plank.

Q. Seemed to be in its place?

A. Seemed to be in its place all right.

Q. What was it, a fir plank?

A. Why, it was soft wood, I would not say whether fir or pine, it was a 2x12 or 2½x12.

Q. Is there any way you can account for the loosening of that plank except the bilge water pounded it up?

A. No, I don't know of any way it could have got loose, unless the water just beneath hammered underneath the plank until it lifted it right up.

(Testimony of Max Gunther.)

Q. What kind of a space was there in which the bilge water could accumulate underneath the interior plank of the ship and the outside plank on the bottom?

A. Well, I think right at that place it is about nine inches, something like that. Away forward it is more, it goes as much as maybe twelve inches. I don't know exactly, I didn't measure it.

Q. Now, the water in that space could not have a great deal of pressure, a great deal of force, could it? [349]

A. Well, it would have enough force to loosen the plank, working from one side to the other, washing.

Q. Did you ever know anything like that to happen in any other ship that you were ever sailing in?

A. Why, no, I never seen it. I have never had as rough weather in other ships as I had in her at that time.

Q. How did that weather that you experienced in going into Sitka at that time compare with the heaviest you have had in going to sea?

A. Heaviest weather I have ever seen on the Alaska coast.

Q. Do you know the force of the wind we had in the gale here in Seattle last night?

A. Why, no, I was asleep last night.

Q. Did not wake you up?

A. No. I did not go to sleep until twelve and I slept after that. I was ashore.

Q. Is there any way to account for the wetting of the cargo on this trip of the "Jeanie," except that

(Testimony of Max Gunther.)

it was by water that went through the seams of the ship or the leakage in the hull of the ship?

A. No, I think that is the only way the water got in, through the seams of the ship and through the seams of the deck while the vessel was straining and laboring in the heavy head sea and rolling around.

Q. Is the planking constituting the interior skin of the ship laid on close together and tight or is there a good many openings?

A. Why, it is laid on together tight, except away up above there are openings where you put the salt in to keep the wood from rotting, that is right underneath the beams. [350]

Q. It is your theory that in the rolling of the ship the bilge water swashes through some seam or opening in the skin of the ship to get on the cargo?

A. That is my opinion.

Q. Did you ever notice before the occurrence, or since then, what the condition of the skin of the ship was, as to having seams or openings in it? Did you ever see any big cracks or seams that water could swash through?

A. Why, not big cracks; I have seen little cracks where the water could get through, yes.

Q. How wide would you call these little cracks?

A. Why, you can hardly see, water would go through almost anywheres, don't need to be any crack. In fact, I will not say it was a crack, I would say where the planks were put together, it don't take much when the ship is rolling and straining for two planks joined together to get a part a

(Testimony of Max Gunther.)

little bit and the water will seep through, especially when rolling with force from one side to the other. If I had seen a crack in the ship anywheres where I thought the water would come through I would have fixed it so that the water would not have been able to come through.

Q. If the ship was steady the water would not come through these seams or spaces unless there was a good quantity of water in the bilge?

A. The water will not come through unless there was too much water in the bilges so that it would overflow.

Q. Well, you think it was the rolling of the ship that caused this water to swish and splash through?

A. That is my idea, when the ship was rolling and laboring [351] them kind of planks kind of work a little bit backwards and forwards and make cracks the water spurted through.

Q. Have you ever known any other instance of cargo being damaged by water in that way?

A. You mean in that ship at any time?

Q. Any ship you have ever been in. You would not say that was a common experience in carrying cargoes, would you?

A. No, it is not, it is not a common experience unless the ship is rolling and then it is apt to do that in the working of the ship.

Q. Well, do you remember any cases where the shippers sued for damages on account of a cargo being wet that way?

A. No, I never heard of anything before.

(Testimony of Max Gunther.)

Redirect Examination.

Q. (Mr. BOGLE.) You say that is not a common experience for water to blow through these cracks that work loose during heavy weather?

A. During heavy weather when the ship is rolling.

Q. Have you ever known a ship where that had happened before any other ship that you have been in?

A. I never experienced such heavy weather in any other ship.

Q. Have you ever had much experience with wooden ships?

A. I have been in quite a few of them.

Q. That is not a happening that you reasonably expect to occur, is it?

A. For the water to blow through?

Q. Yes, for rough enough weather so that water would blow through the side of the ship?

A. It will not unless the ship is rolling heavily from one [352] side to the other.

Q. It does not do that very often, does it?

A. It does in rough weather it rolls; when the ship rolls it does not always blow.

Q. Did you see any openings in the skin of the ship where it blew through—what do you call that, the skin?

A. The skin. Well, you see the seams where the planks are joined together there—

Q. Did you notice any cracks?

Q. (Judge HANFORD.) They call the planking on the inside of the ship, the skin of the ship?

(Testimony of Max Gunther.)

A. Yes, sir.

Q. (Mr. BOGLE.) Did you notice any cracks or openings in the skin of the ship prior to the time the salmon was loaded or during the course of the voyage?

A. No. I noticed the place where they are joined together. I did not notice any cracks. If there was I would not have left them there.

Q. Do you think that any of this damage was caused by reason of this plank working loose, any salmon was damaged by reason of that?

A. Why yes, when I came down there the water was washing from one side to the other.

Q. How far was that plank from the salmon?

A. Why the plank was cut loose right about a foot and a half from where the salmon was stowed.

Q. Was that plank the same size and the same construction as the balance of the construction of the ship? A. Yes, sir.

Q. Apparently the same age? [353]

A. Yes, sir.

Q. Do you think any of the salmon was damaged by water coming through the seams of the ship?

A. I am positive of it, I seen it when I came down there, I had rubber boots on and I saw the water splashing up against the salmon.

Q. Do you think there was any damage by water coming through the deck seams? A. Yes, sir.

Q. That water under the hatch, that damage could not have been caused by water coming through the skin of the ship? A. No.

(Testimony of Max Gunther.)

Q. Has the "Jeanie" made many voyages with salmon while you were aboard of her, during the entire time you were aboard of her, did she carry any other salmon shipments?

A. Yes, we carried shipments before and after that.

Q. Ever have any damage other than in this one shipment? A. No.

Q. Did you carry any coal on the upbound voyage on any of these other trips that you remember?

A. Yes, I think we did.

Q. Now this coal which you said was loaded in the aft part in the between decks, at the time the Chilkoot salmon was taken aboard, how far was that from the place where the salmon was loaded?

A. In the aft hold or forward?

Q. I thought you said there was some coal in the aft between decks?

A. In the forward between decks in the aft part.
[354]

Q. In the aft part of the forward between decks?

A. Yes.

Q. How far was that from the salmon?

A. The whole length of the hatch is 16 feet, and it was about eight feet away from the aft part of the hatch. The whole length of the hatch is 16 feet and the salmon was on the fore part of the hatch, about 10 or 12 feet. Sixteen and ten is twenty-six—it must have been 32 or 34 feet away from the coal.

Q. Did you notice any of that coal-dust flying at the time you loaded the salmon? A. No, sir.

(Testimony of Max Gunther.)

Q. At the time you put up the canvas to protect the salmon did you notice any coal-dust whatever on the salmon? A. No, sir.

Q. What was the condition of the weather at the time this salmon was unloaded at Seattle, was it raining?

A. Well, I do not remember that exactly, whether it was raining during the time, it was January.

Q. You do not remember definitely?

A. No, I do not remember exactly.

Q. Was this salmon in apparently good condition at the time it was loaded in Alaska and delivered to the ship?

A. Well, as far as I could see it was outside of the boxes. Of course you may have wet salmon cans inside of the boxes and you will not be able to notice it outside.

Q. Was that salmon taken out of the warehouse up there?

A. Yes. Especially at Chomly, we were loading salmon at Chomly, and there was quite a bunch in the warehouse that was wet, and the only way we found it out a sailor dropped [355] *dropped* a box and it busted and when I looked at the cans I found it was damp on top and we opened quite a few boxes and we seen that they were all damp, and I told him, I said we will not take this package. He says the roof is leaking a little bit.

Q. You do not know the condition the cans were in in the other boxes?

A. No, we had taken quite a lot aboard then. The

(Testimony of Max Gunther.)

only way to see is to open them and we don't generally do that.

Q. You had already taken some aboard?

A. Yes, sir.

Q. Is there a certain amount of dampness in the hold of a wooden ship?

A. Well, the hold is supposed to be dry all the time.

Q. Is it perfectly dry?

A. It is perfectly dry unless the hatch is open and it rains in.

Q. Was it dry when you loaded this salmon aboard? A. It was dry when we loaded it.

(Witness excused.)

Hearing adjourned. [356]

**[Testimony of F. O. Burckhardt, for Libelant
(Recalled).]**

Seattle, February 16, 1915.

Present: Judge C. H. HANFORD, for the Libelant.

Mr. LAWRENCE BOGLE, for the
Claimant.

**FURTHER TESTIMONY ON BEHALF OF THE
LIBELANT.**

F. O. BURCKHARDT, recalled, testified on behalf of libelant as follows:

Q. (Judge HANFORD.) First, I want to call your attention to a statement of yours on page 8 of the record, when you were examined as a witness before, referring to the time when the goods were being reconditioned in the warehouse. According to the report you made this statement: "I made a number

(Testimony of F. O. Burckhardt.)

of trips to the warehouse when the salmon was being reconditioned, and saw them open cases that apparently were all right, when they got into them they found cans that were covered with coal-dust, and some of the cans would be wet." Do you want to make any explanation of that statement, if you do, you may make it now.

A. Well, I do not remember exactly what I testified to that day—

Q. What is the fact, as you remember it?

A. I do not remember at this time of any of the cans having been wet.

Q. You mean cans that were in dry cases?

A. Cans that were in cases that were dry the cans were dry, although there were a lot of them, a great many of them covered with coal-dust.

Q. These cans inside of dry cases had coal-dust?

[357] A. Yes, sir.

Q. What is the fact as to cases themselves being in the warehouse that had not been set out as damaged cases—any of these cases being wet?

A. Oh, there were a lot of cases in there in the warehouse that had not been set out originally, that we found were wet when we went through the pack later on.

Q. What do you know about any bills of lading having been issued or delivered to anybody, for this shipment of goods?

A. I never saw any bill of lading that was delivered to myself or any of the employees of the company.

(Testimony of F. O. Burckhardt.)

Q. Did you see any bill of lading in the hands of the consignee or the wharf or the warehouse people, or Mr. Swan, or anybody else?

A. I do not remember as to whether Mr. Swan had a bill of lading or whether I saw one in his possession or not.

Q. Well, how about seeing it anybody else's?

A. I do not remember seeing a bill of lading in anybody's possession.

Q. At the cannery, was there any bill of lading left or found there, to your knowledge?

A. No, sir.

Q. Did the watchman up there ever report to you anything about a bill of lading?

A. To my knowledge there was never, at any time, any shipment of salmon was there a bill of lading delivered to my watchman at Chilkoot.

Q. That is the cannery you had charge of?

A. Yes, sir. [358]

Q. Do you know Mr. Banbury, the purser of the "Jeanie," on that trip? A. Yes, sir.

Q. Have you had any conversation with him about bills of lading for this shipment?

A. I had a conversation with Banbury in Juneau.

Q. Fix the time, as near as you can.

A. Some time during the month of November, 1914.

Q. Now, in that conversation, did Mr. Banbury tell you positively that he did not deliver any bill of lading to the watchman at the cannery?

A. He told me he was not sure as to whether or

(Testimony of F. O. Burckhardt.)

not bills of lading had been delivered to the watchman at Yes Bay or Chomly, but his impression was that they had not been so delivered; that as far as Chilkoot was concerned he was absolutely positive that no bill of lading had been delivered to the watchman, for the reason that he was under the impression that my watchman could neither read nor write—that is at Chilkoot. And, he stated furthermore, in that conversation, that his impression, his recollection was, that the bills of lading had all been delivered to Mr. Swan for delivery to us after arrival of the “Jeanie” at Seattle.

Cross-examination.

Q. (Mr. BOGLE.) Mr. Burckhardt, you testified formerly in this case, approximately one year ago, February 18, 1914, the record shows?

A. Yes, sir.

Q. Almost a year to a day. [359] A. Yes.

Q. Was your recollection of the facts any clearer at that time than they are now?

A. Were they any clearer?

Q. Yes, sir.

A. Oh, I could not say that they were any clearer, for the reason that this thing has been discussed so much since that time, that I do not think there is any difference, probably, as to my recollection.

Q. Now, the statement which Judge Hanford just read to you was made by you in direct answer to the question asked by Judge Hanford, the statement he has just read to you, page 8 of the record, and now

(Testimony of F. O. Burckhardt.)

you say that statement was not correct, as I understand you?

A. Well, I don't know—I did not mean to say that that is not correct transcription of what I said at the time, but what I meant was that there were a lot of these cases that were in the warehouse that had been passed as being O. K. and dry, that were not dry. The cases were wet and the cans were wet. I do not remember having made this particular statement, and I do not remember of having seen at the time that I made these various investigations any wet cans in dry boxes.

Q. You do not remember that now? A. No, sir.

Q. These cases that you found in the warehouse to be wet did any of these cases have any coal-dust?

A. Coal-dust in the case?

Q. Yes, in the wet cases in the warehouse.

A. You mean were there some of them—[360]

Q. Yes, in any of the wet cases. You say there was a certain amount. Some two thousand cases were segregated and stacked on the dock as damaged cases. A. Originally, yes.

Q. Now, you testify that after you went into the warehouse and made a further inspection, that you found some wet cases in the warehouse?

A. Yes, sir.

Q. Do you remember, approximately, how many wet cases you took out of the shipment in the warehouse? A. No, I do not remember.

Q. Approximately, how many?

A. Well, I don't know. I do not believe I ever

(Testimony of F. O. Burekhardt.)

kept tab on that or tried to keep a record of it.

Q. There were some 27,000 cases in the warehouse, probably a little more, was there not?

A. On the original shipment? That is the amount of the original shipment.

Q. The original shipment was something over 29,000 cases. Two thousand cases were segregated and placed on the dock.

A. Well, those were sent over in the warehouse also for overhauling; they were not overhauled on the dock, they were all in the warehouse.

Q. I understand that, but they were segregated as being damaged cases on account of their wet condition? A. Originally, yes.

Q. And that left about 27,000 cases, a little over, in the balance of the shipment?

A. Whatever the difference would be.

Q. Between 27,000 and 29,000. Now, what proportion of [361] these 27,000 cases which were passed over into the warehouse originally as being in perfect condition, did you afterwards find were wet?

A. Oh, I could not tell you that without looking at the records. I would not be able to give you an intelligent answer to that.

Q. Well, Mr. Burekhardt, have you any record that would show that? I would like very much to get an answer to that.

A. How many cases there were that were wet?

Q. Of the 27,000 that were passed over to the warehouse originally as being all right.

(Testimony of F. O. Burekhardt.)

A. I do not know whether we have a record of that. I think you could get a statement probably a whole lot better from Horner who overhauled that cargo, than you could from me. Horner was on the job all the time and I only went down occasionally.

Q. So that the wet cases which you picked out were only a few, comparatively a few, were they?

A. Well, I did not pick them out. You misunderstand me. I did not say that I picked them out; but he would call on us every once in a while to come down and take a look at the condition of the packages down there.

Q. Mr. Horner would? A. Yes.

Q. And you would go down?

A. And we would go down and make an inspection with them. But if you have got 27,000 cases of salmon piled up in a warehouse, piled to the rafters, you will readily understand it is not possible for you to go through and pick out of these 27,000 cases all of the wet cases [362] yourself.

Q. No, I do not mean that you did the actual work, but of the 27,000, could you give some proportion of the amount which you yourself saw were wet? Were one-half of them wet?

A. Well, I could not tell you that. I could not see anything that was exposed to view.

Q. I do not think you quite get what I mean.

A. We would see those cases all piled up in a row and we would break down a row and then we would get an idea by looking them over what was wet. And we would find piled among these dry cases a

(Testimony of F. O. Burekhardt.)

certain amount of wet cases. What that percentage of wet cases was I do not know. I do not want to give any guess, because if I did it would not be anything but a guess, without any great degree of accuracy.

Q. I wanted to get, if you had some idea, how many wet cases you saw, that is approximately, I do not mean down to an exact number.

A. I could not tell you that approximately. I do not know how many wet cases. I know there were a lot of wet cases in there, scattered through the pack, here and there you would find wet cases.

Q. What proportion of the shipment you inspected, fifty per cent of them wet?

A. Fifty per cent of them?

Q. Or was it larger or smaller percentage?

A. Oh, I don't know. I would say along about—well, I could not answer that question, whether fifty per cent or whether more or less. [363]

Q. Was it somewhere in that neighborhood?

A. I know there were a lot that were wet; what the percentage was I do not know.

Q. Would you say there were twenty-five per cent?

A. I say I do not want to make a guess at it.

Q. You do not remember. You just remember you saw some wet cases?

A. I saw a lot of wet cases there.

Q. You do not know how many. Now of the dry cases. You do not know how many dry cases?

A. If I know how many wet cases there were I

(Testimony of F. O. Burckhardt.)

could tell you how many dry.

Q. That would follow. Of the dry cases do you remember what percentage showed damage by coal-dust?

A. There you are getting back to that percentage again, that I cannot answer.

Q. That is a very important point in this case, Mr. Burckhardt.

A. I think you would probably get a better idea of how many there actually were from the man that overhauled them than from a man who went down occasionally for an examination and spent perhaps a half hour or hour looking over that part of the pack that happened to be exposed at that particular time.

Q. When did you first obtain knowledge of the fact that there were some wet cases in the warehouse, which had been passed originally as being good cases?

A. It was not long afterwards. I do not remember just how soon after the cargo had been discharged.

Q. Within the week?

A. Oh, I think it was within a week of the time they had been [364] discharged.

Q. You got your knowledge from Horner or some of his assistants?

A. As I remember it came from Horner or the warehouse man.

Q. Mr. Burckhardt, these cases which were wet,

(Testimony of F. O. Burckhardt.)

were you present when any of these cases were opened up?

A. When they were opened up in the warehouse?

Q. Yes. A. Yes.

Q. In what way did the wetting of the cases damage the contents? A. Damage the contents?

Q. The contents of the cases, cans, labels, etc.?

A. The water and the coal-dust had run down the side of the label.

Q. Was there coal-dust in all of the wet cases?

A. Why, I think practically in all the cases, these wet cases, there was coal-dust, as I remember.

Q. Of course you did not inspect all of the wet cases by any means? A. Oh, no, no, sir.

Q. Was there any damage to the dry cases which were opened up particularly the damage caused by coal-dust? I understand you testified to damage to some of the dry cases?

A. Oh, there were cases that were dry, and cases that had been wet and dried out in the warehouse, I imagine they had dried out in the warehouse, and the labels would be covered with coal-dust, and the top of the cans would show coal-dust.

Q. Would the tops and bottoms of the cans show any other [365] damage beside coal-dust?

A. I do not think the bottoms of the cans. The bottoms of the cans were all right, as I remember; it was on the tops and on the sides.

Q. Well, what damage would there be to the top beside the coal-dust?

(Testimony of F. O. Burckhardt.)

A. Oh, there would be a lot of places where rust had started.

Q. Any other damage to the tops besides rust?

A. Beside rust? No, that was the only damage I can recollect at this time, the principal damage.

Q. What kind of tops were you using?

A. How do you mean, what kind of tops.

Q. What kind of tops? A. Tin tops.

Q. Any particular kind?

A. Particular kind of tin?

Q. Were you using the same kind of tops you are using now? A. Yes, sir.

Q. You are sure of that? A. Sanitary tops.

Q. Is it not a fact that you were using a particular kind of top and bottom that season, which you are not using now?

A. No, we are using the same weight top and bottom that we are using now.

Q. That was made out of the same tin?

A. Same kind of tin, same weight of tin.

Q. Was it lacquered or varnished in any way before being used?

A. These tins that we used that year, that was 1912, they were enameled tins. [366]

Q. You are not using these ends this season?

A. Enameled?

Q. Yes, sir.

A. No, we are using plain and black end.

Q. Did you ever use these enameled ends any season before or after the season of 1912?

A. Yes. I used enameled ends in 1912, and used

(Testimony of F. O. Burekhardt.)

enameled ends in 1913 and 1914.

Q. You used these last season, did you?

A. Yes, sir.

Q. Through your entire pack?

A. No, sir; partially.

Q. Is it or is it not a fact that you merely used in 1913 and 1914 what you had left over from 1912?

A. Oh, yes.

Q. You did not buy any more of these enameled ends? A. No.

Q. Why did you stop using these, Mr. Burekhardt?

A. I will tell you. We used enameled ends in 1912 because we cut out the lacquering; we were putting out a tin can without and lacquering or enamel outside of the ends. We bought our ends from the American Can Company. As a matter of fact, we have always bought our ends from the American Can Company since we have been in the sanitary business. Our contract with the American Can Company provides we must buy our tops and bottoms from them. And we bought the enameled ends because we thought that that was cheaper to buy enameled ends and do away with the lacquering in the cannery, and get rid of the danger of fire. A lacquered can is better can—an enameled can [367] is a better can than a lacquered can, I mean.

Q. You used it because you thought it would be cheaper, didn't you? That was in 1912.

A. And it was impossible for us to lacquer only the ends and not the rest of the can.

Q. Is that the reason you stopped using them?

(Testimony of F. O. Burckhardt.)

A. Well, there were several reasons why we stopped using them. We afterwards found it was cheaper, figuring up the cost of these ends, we found it was cheaper to lacquer our own ends, and we went back to lacquering. But, as I said before, the lacquered ends are not as good as the enameled ends.

Q. Is that the only reason you stopped using them, because you found out it was more expensive?

A. That is the only reason I know of. We had our crews up there, and in the regular course it did not cost any more to do our own lacquering, no additional expense to us. There was no rebate on our Chinese contract.

Q. Is it or is it not a fact, Mr. Burckhardt, that these enameled ends will not stand a very strong lye bath or wash?

A. They will stand just as much lye or wash as anything else that can be put on the can. We never had any trouble from that source whatever.

Q. Were you able, at the cannery, during the season of 1912, to wash and clean your cans so as to get all kinds of refuse and grease and matter off the enameled ends, without in any way injuring the enamel? A. Yes, we had no trouble.

Q. You did not have any trouble that way at all?

A. No, sir. [368]

Q. Is it not a fact that in shipments of that year you had a great deal of trouble because of a sort of mildew from the mineral matter which stuck to these ends? A. No, sir.

Q. So that it had to be cleaned off down here?

(Testimony of F. O. Burckhardt.)

A. No, sir; that is not a fact.

Q. Is it a fact, that at least some portion, if not a considerable portion of the work done by Horner, was cleaning this enamel and mineral matter from these enameled ends? A. No, sir; it is not.

Q. That did not enter into the bill at all?

A. No, sir.

Q. You are sure of that?

A. Not anything that resulted from any damage that could possibly have been caused by the fact that we were using an enameled end, or by damage that could have been caused to the cans before they were loaded aboard the "Jeanie."

Q. And none of the damage was caused by reason of any grease or mineral matter sticking to these enameled tops and bottoms?

A. No, sir. I never run across anything of that sort in any of my examinations.

Q. There was none of this cleaning or overhauling or reconditioning of Horner's in connection with cleaning these enameled ends?

A. Cleaning the enameled ends?

Q. Yes.

A. Caused by what?

Q. By any matter sticking to them outside of coal-dust? A. No. [369] A. No.

Q. There was no mildew or any deterioration which in any way injured these enameled ends, caused by anything? A. No.

Q. Nothing at all? A. No.

Q. Never had any trouble with these enameled

(Testimony of F. O. Burckhardt.)

ends outside of this instance?

A. No, we have used them since.

Q. What you had left over?

A. Yes. I would rather use to-day the enameled end than any other end that I have ever seen. That is the best end that the canneryman can use.

Q. It will stand just as strong a wash at the cannery in cleaning it as the lacquered can?

A. Yes, sir.

Q. You can clean it just as thoroughly at the cannery as the lacquered can? A. Yes, sir.

Q. Without any injury? A. Yes, sir.

Q. Of course, you do not know whether Mr. Banbury delivered bills of lading to your watchman at the cannery or not, do you, of your own personal knowledge?

A. I do to this extent, that the watchman delivers to me upon my arrival in the spring, all the papers pertaining to the business that he may have in his possession.

Q. At the Chilkoot cannery?

A. At the Chilkoot cannery. And I know he is a very careful man. And I know, furthermore, that at no time has he [370] delivered to me upon my arrival at my cannery, or sent to me either at Seattle or Portland, any bills of lading for any salmon that was shipped out of there.

Q. You are a stockholder in the libelant company and one of the officers? A. Yes, sir.

Q. What was the occasion of this conversation you had with Banbury? How did it happen to occur?

(Testimony of F. O. Burekhardt.)

Had any question been raised about these bills of lading?

A. I do not remember exactly how we did come on to the proposition of the bills of lading, but I was discussing with him this transaction, and in the course of our conversation I did ask him about the bills of lading.

Q. Were you discussing with him the manner in which the cargo was damaged, was that the subject of your conversation?

A. Well, I think we had a general discussion of the various things in connection with this loss, and among other things we discussed these bills of lading.

Q. Have you known Mr. Banbury very long?

A. Oh, I have known Mr. Banbury since, I think, the first time he came into the cannery was 1911.

Q. Mr. Banbury testified under oath that he delivered a copy of each of these bills of lading to the watchman at the cannery.

A. So I understand.

Q. He further testified that he never told you that there were no copies left at the different canneries.

A. Evidently one of us is not telling the truth.

Q. Evidently one of you is mistaken. But I was just repeating his testimony under oath; I do not mean to say you are not [371] telling the truth.

A. I have read his testimony also. It would look as though one of us was lying.

Q. That was just a casual conversation with him there, was it?

(Testimony of F. O. Burckhardt.)

A. I do not know whether it was a casual conversation. Banbury and I had dinner together. I was in Juneau for about a week attending court and Banbury was stopping at the same hotel where I was, and this conversation took place one evening at dinner.

Q. I suppose you discussed the conditions of the weather encountered on that voyage, and all these various matters, didn't you?

A. Well, he did not remember very much about the weather.

Q. You asked him about that, did you?

A. Yes. He said he did not remember very much about the weather.

Q. Were you going into this matter with the idea of using Banbury as a witness?

A. No, I had no particular idea of using him as a witness?

Q. Mr. Burckhardt, were you at the warehouse or at the dock, the Virginia Street Dock and Warehouse Company, during the time these salmon were being unloaded from the "Jeanie"? A. Yes.

Q. There all the time?

A. Oh, no; not all the time.

Q. You do not remember how many damaged cases were put in that pile on the dock, where they segregated it, do you? A. No, I do not.

Q. That was all there at the time you had this meeting there that day, was it not? They were not counted then? [372]

A. When we had that meeting I think they were still putting cases in there.

(Testimony of F. O. Burckhardt.)

Q. The pile was not complete?

A. As I remember now I do not think the pile had been completed. A lot evidently had gone on through into the warehouse, and some of it had been loaded into the cars.

Q. Did Mr. Swan ever deliver these copies of the bills of lading to you after the ship arrived?

A. On this shipment?

Q. Yes. A. Not to me.

Q. Did he deliver them to your company?

A. I do not know whether he did or not.

Q. You testify to the best of your knowledge that no officer or employee of the company have ever received these bills of lading?

A. Yes, sir; to the best of my knowledge.

Q. What position do you hold with this company?

A. Vice-president.

Q. If they had been delivered to your company they probably would be in the records, and you would know about it, the records of your company?

A. Well, I could find out by making an examination.

Q. You never made that examination to see?

A. Well, I will tell you, this part of the work, that has not been my work particularly; these matters have been handled by my brother and not by me; and, as far as the matter of records are concerned he would be in a better position to testify on that than I would be.

Q. But coming into court here and testifying to the best of [373] your recollection that no employee

(Testimony of F. O. Burckhardt.)

or officer of the company had received bills of lading, you would naturally have made some investigation to find out whether there was some in their possession before coming to testify?

A. If I had known that this question was going to be brought up, why I would have made a more careful examination.

Q. Did you know that Judge Hanford was going to ask you about these bills of lading?

A. I did not.

Q. You never made search to see whether they were in the records of the company? A. No.

Q. And you do not know whether the company has these bills of lading?

A. I do not; that is not in my department.

Q. Is this the first shipment you ever made upon the "Jeanie"?

A. No, we made other shipments by the "Jeanie."

Q. Did you ever receive bills of lading in those cases?

A. I do not remember ever having seen any.

Q. Did you ever receive any bills of lading for any shipment made by you from any vessel operated by Swan?

A. I will tell you that I do not remember having seen any; and at the same time I want to say again that that part of it is not my work.

Q. I am just asking about these, Mr. Burckhardt.

A. But as far as I am personally concerned, and as far as the documents are concerned, they are supposed to go into the watchman's hands in the can-

(Testimony of F. O. Burckhardt.)

nery, and then come to me; neither one of us ever had any bills of lading.

Q. Of course, the watchman up there took no receipt whatever [374] for these salmon that went aboard the "Jeanie"? A. No.

Q. So he really did not know how many cases went aboard, as far as any receipt or record he may have from the steamship is concerned?

A. He usually writes me how many cases have gone, and the brands.

Q. That is his own record?

A. Yes. He writes to me. I get a letter from him any time he ships anything; I send him a letter or my brother will send him a letter telling him what is to go out at a certain time, and what brands.

Q. I mean he does not get any receipt from the steamship when she takes it?

A. As far as I know, he has never had any receipt from the steamship for any salmon shipped out of Chilkoot during the time he has been with me.

Q. Did you have anything to do with the sale of these salmon for your company? A. No, sir.

Q. Who has charge of that? A. My brother.

Q. He is here and is going to testify? A. Yes.

Q. You do not know what the company lost on this shipment, do you?

A. No, that belongs to his department.

(Witness excused.) [375]

**[Testimony of C. A. Burckhardt, for Libelant
(Recalled).]**

C. A. BURCKHARDT, recalled on behalf of the libelant, testified as follows:

Q. (Judge HANFORD.) In giving your testimony in this case on a former occasion, Mr. Burckhardt, you stated as a fact or as a matter of understanding on your part, that bills of lading for this shipment got into the hands of the warehouse people or wharfinger or dock company. I wish you would state more fully all that you know about any bills of lading for this shipment. If you have any positive information, state what it is.

A. As far as this shipment is concerned, we have no records of any bills of lading having been delivered to us. I take it for granted that the bills of lading were delivered to the warehouse, not through any direct knowledge except their custom. I always understood they were delivered there or to Kelley-Clark Company; and we received none at the office and there are none on file in our office now, nor has there ever been any.

Q. What if any reports were ever made to you by the watchmen at the canneries in regard to bills of lading delivered for these shipments that year?

A. I do not catch that.

Q. I want to know if the watchman up there ever reported to you anything about whether they received or did receive any bills of lading?

A. These watchmen very seldom ever receive any bills of lading. There are men there, as my brother

(Testimony of C. A. Burckhardt.)

explained, that we generally write to or send them instructions by the boat that is going in, to deliver to this boat so many cases of salmon of the various brands. Most of the men there are [376] rather illiterate and would not understand what a bill of lading was, or would not be able to read them, part of them, and the watchman at Chomly that year could not either read or write.

Q. You were in charge of the cannery at Yes Bay?

A. Yes, sir.

Q. Now, if the watchman at Yes Bay had received bills of lading, what would he do with them, in the course of business?

A. He would keep them there; put them on a file and keep them there.

Q. And be there when you got back the next season?

A. Yes, be there when I got there in the spring.

Q. Did you observe or notice any such bills of lading being there? A. No.

Q. Merely to direct your attention to the date, I will ask you to look at that letter. Do you remember writing that letter? A. Yes, sir.

Q. This letter is dated November 27th, 1914. Where were you at that time? A. Portland.

Q. Your company has an office there? A. Yes.

Q. About the time of the date of that letter, did you have occasion to make an examination of the papers on file and the records of your company?

A. Yes, sir.

Q. Did you find among these papers or records

(Testimony of C. A. Burckhardt.)

any bills of [377] lading, or reference to bills of lading referring to these shipments? A. No.

Q. Look at the paper I now show you and see if you identify it? A. Yes, sir.

Q. Do you know the signature on that paper?

A. Yes, sir.

Q. By whom was it signed?

A. Signed by Mr. Wiley of the Alaska Coast Company, witnessed by Mr. Swan. Signed by myself for the Alaska Pacific Fisheries, and witnessed by Mr. Claghorn.

Q. Do you know when that paper was signed, with reference to the date it bears?

A. I do not remember the date of it. It was signed at the time—I will tell you the circumstances how that paper came to be signed. At the time the salmon arrived in that damaged condition, the insurance people and the representatives of the steamship company, my brother and myself, went up to the wharf in reference to this damaged cargo, to see whether the matter could be adjusted. And it was at that time that Mr. Horner was selected to overhaul the entire cargo and put it in as good condition as when it left the cannery. It was our understanding that this was to be done by the insurance company, at their expense.

Mr. BOGLE.—I object to that. I would rather he would tell what took place, and the Court can draw its own conclusion from that.

A. I am leading up to that. When Mr. Horner presented his [378] bill the insurance people re-

(Testimony of C. A. Burekhardt.)

fused to pay that bill, and we were going to libel the "Jeanie" for that bill—

Q. (Mr. BOGLE.) When was that?

A. Well, it was a few days prior to this.

Q. (Judge HANFORD.) With reference to the bill—you paid Horner's bill?

A. Oh, yes. We presented our bill immediately, and were trying to make a compromise and settle this thing without a lawsuit. Finally we saw we could not, and we were going to libel the boat, and they gave us this contract so that we would not libel it, hoping in the meantime that we might adjust it.

Q. Now, was that paper signed and delivered to you about the time of that transaction when you paid Horner's bill? A. Yes, sir.

Judge HANFORD.—I offer this paper identified by the witness in evidence.

Paper marked Libelant's Exhibit "B", filed and returned herewith.

Cross-examination.

Q. (Mr. BOGLE.) Who drew this agreement that has been offered in evidence as exhibit "B"?

A. The Alaska Coast Company, I guess.

Q. They drew it and presented it to you, did they?

A. I think so.

Q. How did they happen to draw that? How did it come about that they drew that?

A. We were going to libel the "Jeanie."

Q. Had you at that time paid Mr. Horner's bill?

[379] A. Yes, sir.

Q. You had paid Horner's bill before that docu-

(Testimony of C. A. Burckhardt.)

ment was drawn, had you?

A. Yes, sir, I am satisfied I did, as near as I can recollect at this time.

Q. Mr. Horner's bill was paid by you when it was presented, was it?

A. Mr. Horner first presented the bill to the insurance company.

Q. They are not parties to this suit?

A. No. They are the fellows that are fighting this suit.

Q. They are not parties to this suit?

A. I do not know as to that.

Q. That bill was presented—

A. To Mr. Swan is the man that the bill was presented to, and then the insurance people came to see us, Mr. Foreman and this man West.

Q. And they declined to pay it, did they?

A. Yes, they declined to pay it in full; they wanted to compromise it.

Q. Now, you paid that bill in full, did you?

A. As near as I remember.

Q. Did you pay it all at one time, the entire bill?

A. I could not say as to that.

Q. Just stop and think a minute and see if you can recollect whether you paid that bill in full at one time.

A. No, I could not tell you. I do not know. The only way I could—I could very readily look the matter up in our records. I do not know whether I paid all at one time or in five or six times. [380]

Q. Is it not a fact that the entire bill is not paid

(Testimony of C. A. Burekhardt.)

to-day? A. I think it is.

Q. Referring to this bill of Mr. Horner, which is in evidence, and to the last item on the bill—

A. It is receipted, is it not?

Q. It is receipted as paid. Has the last item on that bill amounting to \$280 been paid?

A. I think it has.

Q. Is it not a fact that the Virginia Street Warehouse & Dock Company are still trying to collect that from you, Mr. Burekhardt?

A. I do not think so. If it has not been paid, we have got to pay it.

Q. You pay the bills of the company, don't you?

A. I sign the checks.

Q. You do not know whether you paid that or not?

A. I pay a good many bills during the year.

Q. I know, but you are bringing suit and alleging that you have made entire payment, in fact you allege that at the time the original libel was filed. Now, is it not a fact that that last item has never been paid?

A. I would have to find out from our cashier; that is the only way I could tell you; I would have to look over the records and get a statement from him.

Q. Could you do that? We have information to the effect that it has not been paid. You heard your brother's testimony with reference to the enameled ends used in 1912? A. Yes, sir.

Q. What do you say with reference to these ends, Mr. Burekhardt? [381]

A. Well, we tried enameled ends that year.

(Testimony of C. A. Burekhardt.)

Q. I mean as to any of the damage to this salmon being caused in any way by the enameled matter or grease sticking to these ends, causing a sort of mildew?

A. No, we have had no complaint; we paid no claims.

Q. You inspected the shipment when it arrived here. Did you see such damage?

A. No, sir, nothing unusual; I saw nothing unusual.

Q. You do not know whether Horner as part of his labor washed all these cans, not all of them, but a large portion of them, the enameled tops and bottoms, so as to remove mildew and grease?

A. No, I never heard of it.

Q. Particles of *sich*, etc., sticking to them?

A. No.

Q. You do not know anything about that?

A. No. We generally put the fish in the can.

IT IS STIPULATED that Mr. Small, of Kelley-Clark Company, and Mr. Hall, of the Virginia Street Dock & Warehouse Company, would testify, if called, that the original bills of lading in this case, neither the original nor copies of the bills of lading in this case, have been delivered to them or were ever in their possession.

Q. You would not be able to give us any accurate information as to the number of cases in this shipment which showed some damage by being wet?

[382] A. No.

Q. Nor the part or protection that were damaged

(Testimony of C. A. Burekhardt.)

by having coal-dust in them?

A. When these people asked me if I was satisfied to have Horner overhaul the matter and have Horner put them in as good condition as when they left the cannery, I accepted that and so I did not bother about details at all.

Q. Now, when coal-dust gets into a shipment without any water, the only labor necessary is to wipe off with a dry rag, is it not?

A. To wipe off the coal-dust?

Q. Yes, with a dry rag.

A. Yes, that is all, and probably the labels might be soiled by the dust and have to replace them.

Q. That would not occur in very many cases?

A. This coal-dust would smear things up pretty bad.

Q. Yes, if rubbed.

A. They would rub in there together; the cans have a little play in there, and if the coal-dust got in there.

Q. Did you notice such damage in there?

A. Yes, the dry cans were soiled. But as far as the coal-dust on the tins was concerned, you could rub that off with a dry rag, or a wet rag any way.

Q. Mr. Burekhardt, this entire shipment has now, at this time, all been disposed of, has it not?

A. Well, I could not tell you as to that.

Q. Can you testify at this time, Mr. Burekhardt, that you have suffered any damage whatever by reason of the delay or the time consumed in reconditioning this shipment; that you lost any market or that

(Testimony of C. A. Burekhardt.)

you lost any sale? [383]

Judge HANFORD.—I object to the question, because it is irrelevant and outside of the scope of the examination in chief, and the matter has been fully covered by testimony heretofore taken.

Mr. BOGLE.—I will call Mr. Burekhardt as my own witness for this purpose, as the Judge objects to the last question.

Q. (Mr. BOGLE.) You have verified an amended libel in this case, dated February 15, 1915. This is your signature, is it not?

A. Yes, sir.

Q. Have you read this amended libel?

A. Yes, sir.

Q. Referring to paragraph X of this libel, Mr. Burekhardt, can you testify that you sustained a loss of \$7935 by reason of the cargo being reconditioned?

A. I made a statement upon this thing, but I haven't got it with me.

Q. Can you testify that you lost that amount of money, for the reasons stated in that paragraph, which you have just read?

A. Well, I have made up a statement of that and I gave it to Judge Hanford; I haven't it with me.

Judge HANFORD.—That is in the testimony you gave before.

Q. You know that you lost that amount of money?

A. I made a statement of what our losses were, and I haven't that statement with me; I think I gave it to the Judge. I have every reason to believe that these are the amounts.

(Testimony of C. A. Burckhardt.)

Q. This paragraph alleges that between the dates when this salmon arrived here, approximately January 10th, 1913, [384] and the date when the cargo was entirely reconditioned, that the market price declined, so that this shipment was worth some \$7,900 less? A. Yes.

Q. And that you suffered a loss thereby in the sum of \$7,900. A. Yes, on account of that decline.

Q. Do you swear that is correct, that you suffered that loss?

Judge HANFORD.—I object to the question. I expect the Judge to say that as a matter of law.

Mr. BOGLE.—I think you are libeling us for actual damages sustained, not theoretical damages.

Judge HANFORD.—That is actual damage.

Q. I ask you if you actually sustained that damage of \$7,935.40. Did you, Mr. Burckhardt?

A. As I stated to you before, the only way I could answer that question, is as I have answered before. I made up a statement of our losses and gave that to the judge and I haven't a copy of it with me.

Q. Don't you know, as a matter of fact, Mr. Burckhardt, that you had a large amount of salmon of the same brand and the same label in the warehouse at this time? A. Yes.

Q. That you were unable to dispose of?

A. Yes.

Q. Well, how could you suffer this loss?

A. The market declined between the time of the arrival of that salmon and before we were able to market it.

(Testimony of C. A. Burckhardt.)

Q. But at the time the market declined you had an equal amount of salmon in the warehouse which you were unable to dispose of. In what way did you sustain a loss? [385]

A. Had not the market declined?

Q. That did not mean a loss to you if you did not sell the salmon.

A. I do not know that we have to prove that.

Q. You certainly have to prove that you actually lost it.

A. We did not lose an actual sale.

Q. You did not lose any actual sale?

A. I can answer it that way.

Q. This is merely the difference in the market price? A. Yes, sir.

Q. And you did not lose any sale of the salmon, and you had no opportunity to sell it during that time? A. I do not think we did.

Q. Now, referring to paragraph XI, the interest on that amount. A. Yes.

Q. The same applies to that, if you had no actual sale for it, you had to hold it anyway, didn't you?

A. Yes, sir.

Q. And the same would apply to paragraph XII, would it not, storage? A. Yes, sir.

Q. And also for insurance? A. Yes, sir.

Cross-examination.

Q. (Judge HANFORD.) When you were summoned as a witness in this case on a previous occasion, had you recently then investigated the market conditions of canned salmon, at the time these goods

(Testimony of C. A. Burekhardt.)

were being reconditioned? [386] A. I had.

Q. Was your testimony given on that occasion in accordance with what you then knew to be the facts in regard to the market price of goods of the same quality and brand of these, on the different dates, that is the date of arrival in January and the date when the goods were put in a marketable condition in March? A. Yes, sir.

Q. Did you make a computation of the difference, that is the total market value of the whole shipment less in March than it was in January?

A. Yes, sir.

Q. Are these figures stated in your amended libel of that difference in accordance with your recollection of what you found to be the case?

A. Yes, sir, as near as I can remember now.

Q. (Mr. BOGLE.) You did not actually suffer that loss, Mr. Burekhardt?

Judge HANFORD.—I object to the question as a repetition and calling for a legal conclusion.

A. As I stated before I do not think we suffered any loss.

Q. (Judge HANFORD.) I will ask another question now. Do you mean to testify that there was no opportunity to sell salmon at that time, or that you actually missed no opportunity to sell salmon because there was no purchaser, or that you were able to fill orders out of other salmon?

A. Yes, sir.

Q. That is the case. [387] A. Yes, sir.

Q. You kept on selling, there was market?

(Testimony of C. A. Burckhardt.)

A. Yes.

Q. And instead of selling these goods you sold other goods that you had in stock? A. Yes, sir.

Q. (Mr. BOGLE.) Is it not a fact, Mr. Burckhardt, that you actually sold some of these goods during that period, orders for which you had taken before the goods arrived, intending to sell them different goods you had in stock, and that you filled the order with these goods because they had been reconditioned and were in first-class order?

A. No, I do not think that is true.

Q. If Small of Kelley-Clark so testified, that is a fact, is it not?

A. Yes, Mr. Small would know.

Q. Mr. Small, as a matter of fact, handles your entire shipment?

A. Kelley-Clark. These goods were ordered out; this shipment of goods was ordered out from the cannery to cover sales.

Q. Actual sales which you had?

A. Yes. Otherwise we would not have brought down the cargo, because we could have kept the cargo at the salmon cannery without any storage charges.

Q. Is not that a sale which you hoped to get but which you did not receive?

A. No, some of these goods were sold. I cannot tell you how many, offhand. Some were sold, otherwise the goods [388] would not have been ordered out. I will not say they were all sold; I know they were not all sold, but there were other goods arrived afterwards, that were brought down.

(Testimony of C. A. Burekhardt.)

Q. In answer to the Judge's question, you said these goods, or part of them, that you filled orders out of salmon which you had already in the warehouse? A. Yes.

Q. That was salmon that arrived previously?

A. Yes, I answered that question. Let me explain. If we had not had any other salmon we would have lost sales of salmon.

Q. Mr. Small's testimony would be more accurate than yours on that? A. Well, it ought to be.

Q. And does it not seem unreasonable to you that you would have sales for salmon which was in Alaska, and instead of selling salmon which you already had in the warehouse here, the same brand—why would you sell salmon in Alaska when you had an equal amount in the warehouse of the same brand?

A. Well, that is a pretty hard thing for me to explain to you. But these things arise very often, that we still have brands of salmon here and order out more salmon, and the salmon that is in the warehouse probably would stay here and the new salmon would move on out.

Q. Why would that be?

A. Well, the other salmon was over in the warehouse, stored there, and the other stuff on the dock they would simply fire it on out, saving a transfer charge for one thing, taking it over into the warehouse and back again on the [389] Virginia street dock. There is the fish on the dock and they take them.

Q. It would be cheaper to put the steamer to the

(Testimony of C. A. Burckhardt.)

dock than to forward from the warehouse?

A. No, I did not say that. I say that the salmon arrive here, and no doubt they would ship the salmon on the dock in preference to the salmon that has been in the warehouse.

Q. You testified that this salmon that arrived, a large portion of it was sold, and that is the reason you ordered it down?

A. That is my understanding, my recollection of it. There was a part of that salmon, I cannot tell you what percentage of it was sold, but it is my recollection at this time that that salmon was ordered out on account of orders from Kelley-Clark Company that they needed these brands.

Q. And that you had a large amount of the same brand in the warehouse? A. That might all be.

Q. Unsold? A. That might be.

Q. For which you had no sale?

A. As I said before their testimony would be clearer than mine.

Q. We want to be perfectly fair here, Mr. Burckhardt. Is it not a fact that in making up this computation that you have just taken the amount of salmon, and you figured up the market value of it the day it arrived and you then figured up the market value the date when the reconditioning was entirely completed, and that you put that [390] sum in irrespective of any sale or prospective sale?

A. Well, I would say that we did.

Q. (Judge HANFORD.) Have you been advised by your counsel that that is the legal measure of dam-

(Testimony of C. A. Burckhardt.)

ages, and that you are entitled to recover that under the law? A. Yes, sir.

Q. (Mr. BOGLE.) So that the question of sale or possible sale or purchase of this salmon did not enter into it at all? A. No, sir.

(Witness excused.)

Hearing adjourned. [391]

United States of America,
Western District of Washington,
Seattle, Washington,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle, in said District, do hereby certify that

The foregoing transcript, from page 1 to page 333, both inclusive, together with the exhibits returned herewith, contains all of the testimony offered before me under the order of reference herein.

The several witnesses, before examination, were duly sworn to testify the truth, the whole truth and nothing but the truth. The testimony, on the dates therein indicated, was reduced to writing in shorthand by myself, or under my direction, and thereafter typewritten. And I certify that the testimony contained in said transcript is the testimony given by the witnesses at said times.

Proctors for the parties stipulated that the testimony when transcribed and certified by me should have the same force and effect as if read and signed by the witnesses.

The several exhibits mentioned in the testimony

and shown by the index, are returned herewith.

I further certify that I am not of counsel nor in any way interested in the result of this suit.

Witness my hand and official seal this 13th day of March, 1915.

[Seal]

A. C. BOWMAN,
U. S. Commissioner. [392]

COMMISSIONERS' TAXABLE COSTS.

Libelant:

Hearings February 18, 19, 1914, Feb.

16, 1915\$ 9.00

Administering oaths to 7 witnesses.... .70

Marking and filing 2 exhibits..... .20 Pd.

Transcript above hearings, 600 folios

at 10c 60.00

\$69.90

Claimant:

Hearings, June 30, July 1, Nov. 13,

1914 9.00

Administering oaths to 5 witnesses... .50

Marking and filing 7 exhibits..... .70 Pd.

Transcript above hearings 367 folios

at 10c 36.70

\$46.90

[Indorsed]: Testimony. Filed in the U. S. District *District* Court, Western Dist. of Washington, Northern Division. Mar. 22, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [393]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

S. S. "JEANNIE," Her Tackle, Apparel, Furni-
ture, etc.,

Respondent.

ALASKA COAST COMPANY, a Corporation,
Claimant.

**Order to Transmit Original Exhibits [to Appellate
Court.]**

Now, on this 31st day of August, 1915, upon motion of Messrs. Bogle, Graves, Merritt & Bogle, and for sufficient cause appearing, it is ordered that the Libelant's Exhibits "A" and "B" and Claimant's Exhibits 1, 2, 3, 4, 5 and 6, filed and introduced as evidence upon the trial of this cause, be by the Clerk of this court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered, together with the transcript of the record on appeal in this cause.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Order to Transmit Original Exhibits.

[**Deposition of Reed (Thomas) Cochran, for
Libellant.**]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libellant,

vs.

S. S. "JEANIE," Her Tackle, etc.,
Respondent.

ALASKA COAST COMPANY,
Claimant.

**ANSWERS TO INTERROGATORIES AND
CROSS-INTERROGATORIES.**

BE IT REMEMBERED, that pursuant to the stipulation hereunto annexed, on the 16th day of January, A. D., 1915, at my office in the Seward Building, at Juneau, in the Territory of Alaska, before me, A. W. Fox, a Notary Public in and for the Territory of Alaska, residing at Juneau, duly commissioned and sworn and authorized to administer oaths, personally appeared Reed Cochrane, a witness produced on the part of the Libellant herein in the above-entitled action now pending in the said court, who, being by me duly sworn, was then and there examined by me on the attached interrogatories and cross-interrogatories, and testified as follows:

Answer of Reed (Thomas) Cochrane (to Interrogatories and Cross-interrogatories)].

Interrogatory
No.

1. Reed Cochrane. Juneau, Alaska.
2. I was second officer.
3. I have eight years' experience on the bridge in the waters north of Puget Sound.
4. As to the frequency of storms, it is pretty hard to say; but in the winter months we always figure heavy weather; and then there is the difficulty of short days in the winter.
5. She attempted first to get into Gypsum. Could not get in there owing to the weather conditions, and went [395] from there to Sitka. We got in there and discharged and left for Sulzer. Owing to stress of weather we could not get in there and put into Ketchikan. From Ketchikan we went to Bonanza Cove, I think it is called, and loaded some fish there. From there we went to Chomley and loaded salmon. From Chomly we sailed for Seattle. We may have stopped at Ketchikan but I am not sure about that.
6. She took the safest course, but it was not the usual course. It was owing to tidal conditions that she could not take the shortest course through Peril Straits. The captain figured he could make time by going outside instead of waiting for tides at Peril Straits. The open ocean is always safer than running in proximity to land.

7. To save time. It is the shortest course.
8. It was unusually severe. It was continuously rough until the day we got into Sitka. Shortly after getting in there it started again to blow and snow.
9. We, of course, could not ascertain the damage; but we figured she must have made some water laboring outside there.
10. So far as I know she was perfectly seaworthy and in a condition to take cargo. Yes, she was leaking, but whether she was leaking any more than usual I could not say.
11. She was seaworthy or I would not have been in her. As far as leaking is concerned, naturally she was leaking just the same—that is to the usual extent, that is, to the best of my knowledge.
12. I did not.
13. It was exceptionally heavy weather. With a few exceptions we had a gale of wind—heavy head winds—right into Seattle.
14. There was no apparent damage, no.
15. In the Gulf of Georgia.
16. I should judge between 65 and 70 miles an hour.
[396]
17. No, I do not. When the ship got down to Seattle we were paid off and of my own knowledge I know nothing of the condition of the cargo.

ANSWERS TO CROSS-INTERROGATORIES
BY REED (THOMAS) COCHRANE.Cross-Interrogatory
No. 1.

1. I shipped on board as second officer and as pilot. I had nothing to do with the stowing or care of the cargo. I was standing a six-hour watch with the captain in the navigation of the ship. We were standing alternate six-hour watches.
2. I started to sea in 1898 and had fourteen years' experience up to then. I had a master's license in 1912. I got my second mate's license in 1906.
3. About six years.
4. I had been on the "Jeannie" but that was several years prior to the trip in question. I have not been on her since that trip.
5. She was seaworthy to the best of my knowledge or I would not have shipped on her.
6. Yes, 'about five years.
7. I don't remember ever to have been on one that did not leak some.
8. No.
9. On the trip on the "Saratoga" in 1898, I think we experienced the hardest gales I have ever been in in Alaska waters. We figured it blew about 90 miles an hour. The sea, of course, was very high. On this trip we were running outside. I cannot remember any particular instances but in the winter time it is a bad trip. The weather is worse and the

days are short, only five or six hours of daylight. There is also snow.

10. No, I have not.
11. I was on duty part of the time. My watch in the Gulf on this trip was from midnight until six in the morning. She made heavy weather. The "Jeanie" was shipping water and it stopped her headway considerably. I cannot say what effect it had on the "Jeanie" otherwise.
12. During my watch, I should say she averaged about two and one-half knots an hour.
13. Why it was the duty of the captain and myself. I am familiar with the entries.
14. It covers it all right—it does so far as I remember.
15. As stated in my answer to Interrogatory No. 14, the entries appear to be correct, as I remember them.
16. ("Claimant's Identification 1" is marked by the notary "Cochrane's Exhibit 1" and attached to this deposition.)
17. So far as I know they were. They did not break down to my knowledge. I never heard of the pumps being out of order.
18. I am not positive but we figured she did.
19. The course taken was safer than the outside route. It was on this part of the trip that we figured she opened up her seams. She was laboring there.
20. I got my information from the charts and from my own personal knowledge.

21. I answered that cross-interrogatory by saying that she was seaworthy.
22. She was seaworthy and was not leaking any more than the pumps could handle. There was no necessity for repairs.
23. She was not leaking any more than an ordinary wooden vessel would leak after the weather she had been through. The pumps could safely handle the water. I had no personal knowledge of any leaking. I only heard it.
24. I spoke to both Charley and Otto Bureckhardt. They spoke to me about making a deposition as to weather conditions on the trip. This was last summer. My testimony is not influenced by any such conversations. There was nothing in writing.
25. I am still a seafaring man but am now stevedoring for the Pacific Coast Company, the Alaska Steamship Company and the Admiral Line at Juneau. The trip on the "Jeanie" was the last one I made to sea. I went inside shortly after that.

[398]

Claimant's Identification "I."

COCHRANE'S EXHIBIT No. 1.—A. W. F.

Vessel proceeded on usual course for Gypsum, Alaska, but owing to heavy gales and rough seas it was deemed best not to call in at this port, and vessel proceeded on for Sitka, experiencing high winds and heavy cross seas, and on

- Dec. 24th arrived at Sitka, Alaska. Discharged coal at this port and on
- Dec. 27th sailed for Sulzer via the outside, but owing to S. W. gales and heavy seas and ship laboring heavily and shipping heavy seas, turned around and went into Cape Ommany for shelter and laid to from about 11:00 P. M. until on
- Dec. 28th at about 5:25 A. M. when proceed to Sulzer via the inside. Experienced strong S. W. winds with snow squalls, and during the evening heavy S. E. gales. On
- Dec. 29th experienced heavy S. E. gales. Ship unable to make headway and at 8:30 A. M. turned around and went into Ketchikan, arriving there at about 1:43 P. M. Discharged coal at this port, and on
- Dec. 30th sailed for Yes Bay, arriving there at 12:17 P. M., took on board cargo of salmon, and on
- Jan. 1st sailed for Bonanza Cove, experiencing thick heavy snow with strong easterly gales; arriving at 12:20 P. M. took on board portion cargo fish, and at 10:51 P. M. sailed for Chomley. Experienced moderate southerly wind, thick snow, and on
- Jan. 2d arrived at about 9:50 A. M. Took on portion cargo salmon, and on
- Jan. 3d sailed for Ketchikan. Experienced

thick, heavy snow, [399] southerly winds, arriving at Ketchikan at 12:19 P. M. At 3:56 P. M. sailed for Seattle. During the day experienced more or less heavy gales with continuous snow, and on

Jan. 6th vessel experienced easterly gales, vessel straining and laboring heavily, and shipping large quantities of water. On

Jan. 7th Experienced similar heavy weather, vessel shipping large quantities of water and straining to such an extent that vessel leaked considerably, necessitating that pumps be worked every hour, and on

Jan. 8th. at about 11:55 A. M. arrived at Seattle. During the entire trip south vessel experienced exceptional heavy weather, shipping tremendous quantities of water over her decks at times; the decks never being dry, either from the heavy seas or snow, and vessel leaked on the trip south considerably more than usual, necessitating keeping the pumps going more or less continuously. [400]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

S. S. "JEANIE," Her Tackle, etc.,
Respondent,

ALASKA COAST COMPANY,
Claimant.

**Certificate of Notary [to Deposition of Reed
Cochrane.]**

United States of America,
Territory of Alaska,—ss.

I, A. W. Fox, a notary public, duly commis-
sioned and sworn, in and for the First District of
Alaska, and residing at Juneau, duly authorized un-
der and by virtue of the acts of Congress of the
United States, and by the Revised Statutes of the
United States to take depositions in civil causes de-
pending in the courts of the United States, do hereby
certify that, pursuant to the foregoing stipulation,
personally appeared before me, on the 16th day of
January, 1915, Reed Cochrane, a witness on behalf
of the libelant in the above-entitled cause; and that
said witness was first cautioned and sworn by me to
testify the truth, the whole truth and nothing but
the truth; and the annexed deposition of said witness
was by me reduced to writing in shorthand in the

presence of the witness and thereafter transcribed, the signature of said witness being expressly waived by said stipulation. I have retained the said deposition in my possession for the purpose of forwarding the same with my own hand to Hon. Frank Crosby, Clerk of the United States District Court for the Western District of Washington, Seattle, Washington, the court for which the same is taken. [401]

And I do further certify, that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand and official seal, this 16th day of January, 1915.

[Seal]

A. W. FOX,

Notary Public in and for the Territory of Alaska,
Residing at Juneau.

Notary Public for Alaska. My commission expires on May 27th, 1918. [401½]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

S. S. "JEANIE," Her Tackle, etc.,
Respondent,

ALASKA COAST COMPANY,
Claimant.

Stipulation for Taking Testimony at Juneau.

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the parties hereto that the deposition of Thomas Cochrane, a witness on behalf of the libelant herein, may be taken before A. W. Fox, a notary public residing at Juneau, Alaska, at his office in the Seward Building in said city, at such time as may be convenient to said notary public and said witness, upon the interrogatories and cross-interrogatories attached hereto.

It is further stipulated and agreed that, after the witness, deposing pursuant hereto, has been duly cautioned and sworn, his testimony may be taken down in shorthand and transcribed and, after being so transcribed, may be returned to the above-entitled court without being subscribed by the witness, the signature of the witness thereto being expressly waived.

It is further stipulated and agreed that such tes-

timony may be considered and used in evidence in this cause, subject to all objections except as to form of the questions.

It is further stipulated and agreed that, upon the completion of the taking of such deposition, the said notary public shall return the same, in a sealed envelope, together with this stipulation, and the interrogatories and cross-interrogatories attached [402] hereto, to the above-entitled court, addressing the same to "Hon. Frank Crosby, Clerk of the United States District Court for the Western District of Washington, Seattle, Washington," and writing across the end of the envelope the title of said cause and "Deposition of Thomas Cochrane, Witness for Libelant."

Dated this 2d day of January, 1915.

KERR & McCORD,
C. H. HANFORD,
Proctors for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Respondent and Claimant. [403]

**Interrogatories to be Propounded to and Answered
Under Oath by Thomas Cochrane, Witness in
Behalf of the Libelant.**

1. State your full name and place of residence.
2. What was your position as an officer of the steamship "Jeannie" at the time of her voyage from Seattle to Alaska and return in December, 1912, and January, 1913?
3. State the extent of your experience in the navigation of steamships in the waters of Alaska and the Coast north of Puget Sound.

4. State what you know to be the conditions with respect to the frequency and severity of storms in the winter-time along the route traversed by steamships between Seattle and the ports or places in Alaska at which the "Jeannie" called, or attempted to go on the voyage referred to in Interrogatory Number 2.
5. To what places did the "Jeannie" go, and attempt to go on the voyage above referred to, after taking in cargo at Chilkoot?
6. Did the "Jeannie" take the usual or safest course in attempting to go from Gypsum to Sulzer?
7. For what reason did the "Jeannie" attempt to go to Sulzer by going outside into the open ocean, in preference to any other route which she might have taken? [404]
8. What kind of weather was encountered by the "Jeannie" on said voyage from the time of leaving Gypsum until she arrived at Sitka? State particularly the facts as you remember them with respect to the severity and duration of storms or heavy weather encountered in that part of said voyage.
9. State as far as you know, what, if any, damage the "Jeannie" suffered during that part of said voyage.
10. What was the apparent condition of the "Jeannie" as to being seaworthy and capable of carrying cargo safely after the last of her coal cargo had been discharged at Ketchikan?

State particularly if you know whether she was at that time leaking.

11. State the facts as you remember them with respect to the apparent condition of the "Jeannie" at the time of taking her final departure from Ketchikan after the last of her cargo of salmon had been taken on board, with respect to her seaworthiness, and especially whether she was or was not leaking.
12. Did you give personal attention to the state of the "Jeannie" at that time, with respect to any excess of bilge water, and with respect to the effectiveness of her pumps?
13. What weather conditions were encountered by the "Jeannie" on said voyage from the time of leaving Ketchikan until arrival at Seattle? State particularly with reference to the severity and duration of storms or heavy weather.
14. State, if you know, whether there was any apparent damage suffered by the "Jeannie," caused by storms or heavy [405] weather in that last part of her return voyage, and especially in the Gulf of Georgia.
15. In a comparison of weather conditions encountered by the "Jeannie" after passing Seymour Narrows on her return voyage with the weather conditions on that part of said voyage previous to arrival at Sitka, where were the heaviest storms encountered?
16. Give your estimate of the force of the heaviest gale encountered on said return voyage in the Gulf of Georgia; I mean the velocity of the wind in miles per hour.

17. Do you know or can you set forth any matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause?

If yea, set forth the same fully and at large in your answer. [406]

Cross-Interrogatories to be Propounded to and Answered under Oath by the Witness, THOMAS COCHRANE.

Cross-interrogatory No. 1.

If in answer to Interrogatory No. 2 you state that you were 2d officer of the S. S. "Jeanie" in December, 1912, and January, 1913, state what your duties were as such officer, both with relation to stowing and caring for cargo and also as to navigating the ship.

Cross-interrogatory No. 2.

How long had you held 2d officer's papers, and how long had you been a seafaring man prior to December, 1912?

Cross-interrogatory No. 3.

How long had you been an officer on vessels navigating Alaska waters prior to December, 1912?

Cross-interrogatory No. 4.

How long had you been aboard the S. S. "Jeanie" prior to the voyage in question. Did you make any voyages on the "Jeanie" subsequent to this particular voyage?

Cross-interrogatory No. 5.

What was the condition of the "Jeanie," as to

seaworthiness, at the time she left Seattle on this particular voyage?

Cross-interrogatory No. 6.

Had you had any previous experience on wooden vessels?

Cross-interrogatory No. 7.

If so, state whether or not it is a usual and customary thing for wooden vessels to take in a small amount of water, at all times.

Cross-interrogatory No. 8.

Did the "Jeanie" take in any unusual amount of water— [407] any more than her pumps could safely take care of, on her north-bound voyage up to her arrival at Chilkoot, Alaska?

Cross-interrogatory No. 9.

If in answer to Interrogatory No. 4, you make a statement as to frequency and severity of storms on Alaska route, give particular instances, strength of wind, condition of sea and vessel upon which you were engaged at time and place of such storms.

Cross-interrogatory No. 10.

Have you ever encountered any worse weather on the inland waters of Alaska than you encountered on the "Jeanie" on this particular trip? If so, state all such occasions, giving name of vessel, place of storm, etc.

Cross-interrogatory No. 11.

Were you on duty at time "Jeanie" encountered storm, on this voyage in Gulf of Georgia? If so, state the extent of same and what effect it had on "Jeanie."

Cross-interrogatory No. 12.

How much headway did "Jeanie" make during course of this storm?

Cross-interrogatory No. 13.

Whose duty was it aboard the "Jeanie" to make entries in the ship's log? Are you familiar with entries made in "Jeanie's" log during the south-bound voyage of the "Jeanie"?

Cross-interrogatory No. 14.

Referring to attached paper marked "Claimant's Identification 1" does the same give a true and correct account of the "Jeanie's" voyage from December 24th to January 8th as the same appeared in the ship's log-book?

Cross-interrogatory No. 15.

If you do not remember the entries in the ship's log [408] of this voyage, state whether or not the said paper gives a true and correct account of the "Jeanie's" voyage on the dates therein mentioned according to your best recollection of said voyage. If not, state in what particulars the said entries are erroneous.

Cross-interrogatory No. 16.

Have the said paper marked by the notary public before whom your testimony is taken as "Cochran's Exhibit 1" and attach same to your answers and have same returned to the above Court as a part of your testimony.

Cross-interrogatory No. 17.

Were the "Jeanie's" pumps in good condition when she left Seattle, northbound, on this voyage? When, if at any time, did these pumps break down?

What caused them to break down (if you testify that they did break down)? What was done to repair them and how long were they out of order?

Cross-interrogatory No. 18.

State, if you know, whether the "Jeanie" opened up any of her deck seams or seams in her hull during heavy weather encountered by her.

Cross-interrogatory No. 19.

If you answer Interrogatory No. 6 in the negative, state in what respects such course was unsafe—also state what damage if any of the "Jeanie" suffered thereby.

Cross-interrogatory No. 20.

If you attempt to answer Interrogatory No. 7, state from whom you received your information.

Cross-interrogatory No. 21.

If in answer to Interrogatory No. 10, you state that the "Jeanie" was unseaworthy or leaking, state in what respects she was unseaworthy and at what points she was leaking, also [409] state whether or not you as an officer of said vessel called the master's attention to this fact, or made an effort to repair said vessel.

Cross-interrogatory No. 22.

If in answer to Interrogatory No. 11, you state that the "Jeanie" was unseaworthy or leaking, state in what respects she was unseaworthy or at what points she was leaking, also state whether you as an officer of said vessel called the master's attention to this fact or made an effort to repair the same.

Cross-interrogatory No. 23.

If in answer to either Interrogatory No. 10 or 11,

you state that the "Jeanie" was leaking, state the extent of such leaking, whether or not the same was more than a wooden vessel ordinarily leaks, or more than the "Jeanie's" pumps could safely take care on. When did you first notice such leaking and, if you know, what caused the same?

Cross-interrogatory No. 24.

State whether or not you have talked or communicated with Mr. Burckhardt or any representative of the Alaska Pacific Fisheries with reference to your testimony in this case, if so with whom and at what time did you have such conversation? Is your testimony in this case in any way influenced or your recollection of the facts in connection with such voyage refreshed or in any way influenced by such conversation or communication? If such communication is in writing attach the same hereto.

Cross-interrogatory No. 25.

Are you at the present time a seafaring man? If not when did you quit the sea? [410]

[Indorsed]: Stipulation for Taking of Testimony of Thomas Cochrane. Deposition of Reed (Thomas) Cochrane, a Witness for Libelant. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. Published May 11, 1915, per Order of Court. Frank L. Crosby. By Ed. M. Lakin, Deputy. [411]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

S. S. "JEANIE," Her Tackle, etc.,
Respondent.

ALASKA COAST COMPANY,
Claimant.

**Answer [of Thomas Banbury] to Interrogatories
and Cross-interrogatories.**

BE IT REMEMBERED, that pursuant to the stipulation hereunto annexed, on the 13th day of January, A. D. 1915, at my office in the Seward Building, at Juneau, in the Territory of Alaska, before me, A. W. Fox, a notary public in and for the Territory of Alaska, residing at Juneau, duly commissioned and sworn and authorized to administer oaths, personally appeared Thomas Banbury, a witness produced on the part of the Respondent and Claimant herein in the above-entitled action now pending in the above-entitled court, who, being by me first duly sworn, was then and there examined by me on the attached interrogatories and cross-interrogatories, and testified as follows:

ANSWERS OF THOMAS BANBURY.

Interrogatory.

- No. 1. Thomas Banbury; age, 36; Juneau, Alaska;
Dock agent.
- No. 2. Purser.
- No. 3. Yes.
- No. 4. Alaska coastwise freight service. Purser.
- No. 5. Receiving and delivering freight; noting
its condition; making billing; collect-
ing the revenue.
- No. 6. Yes. [412]
- No. 7. Yes, they are in my handwriting.
- No. 8. Yes, I identify the documents marked No.
37, No. 38 and No. 39 attached hereto.

Documents marked 37, 38 and 39 identified by wit-
ness and marked by Notary, "Banbury Exhibit 1,"
"Banbury Exhibit 2" and "Banbury Exhibit 3"
respectively.

- No. 9. It was executed at Chilkoot, Alaska. It is
a record of the number of cases of sal-
mon received aboard the ship. It is the
original bill of lading. It was the
practice to make four copies of a bill
of lading. Two of them were de-
livered to the cannery people, one was
the retain copy for the ship and one
copy was turned into the office of the
ship at Seattle. Owing to the lapse of
time, I am unable to state positively
whether four copies were made on this
particular occasion. The bill of lading
was made out at the cannery on this

occasion and at least one copy was given to the watchman in charge, and I may, as I sometimes did, have mailed a copy to the cannery people below. The cannery on this trip was closed and was in charge of a watchman.

No. 10. "Banbury Exhibit No. 2" seems to be an impression copy. It was made at Yes Bay, Alaska. It is a record of the number of cases of salmon received aboard. I am unable to state, owing to lapse of time, whether four copies were made of this Banbury Exhibit 2. Banbury Exhibit 3 is an original. It was made at Chomley, Alaska. It is a record of the number of cases of salmon received aboard. I am unable to state, owing to lapse of time, how many copies were made of this bill of lading. [413]

No. 11. I do not remember the names of any of the three watchmen *to* I gave bills of lading but I knew them to be the watchmen in charge at the respective canneries.

No. 12. I knew them in every case to be the watchmen in charge. They in each case at the different canneries delivered the salmon to me. I cannot say, after this lapse of time, whether there was anybody else at any of the canneries. I dealt with the watchmen in charge at

each of the three canneries in question.

No. 13. The cases to be loaded were blocked out by the watchmen. I personally in each case checked the shipments.

No. 14. 38 is an impresison copy and 39 is a retain in ink. I am unable to say whether originals were in same form as document 37. The name "Alaska Barge Company" should have been crossed out in every instance. I don't know whether or not it was in this.

No. 15. In the employ of W. F. Swan Co.

No. 16. Yes.

No. 17. I do not remember.

No. 18. I don't know.

No. 19. Yes, almost continuous rough weather in Lynn Canal, Chatham Straits, round Cape Ommany, off the west coast of Barranoff Island and outside of Sitka Sound.

No. 20. The ship was bucking head-seas most of the time while going through the Gulf of Georgia. I do not know how long it took going through the Gulf.

No. 21. I am satisfied that the ship was cleaned up in the holds and 'tween-decks when the salmon went into her.

No. 22. I could observe the conditions of the cans and labels from the condition of the broken cases set aside.

No. 23. No. [414]

- No. 24. Double tarpaulins were used on each hatch.
They were in good condition.

ANSWERS TO CROSS-INTERROGATORIES BY
T. BANBURY.

Cross-Int.

- No. 1. Yes, I was an employee of the company
—purser of the “Jeanie.”
- No. 2. W. F. Swan.
- No. 3. I was purser of the boat and had the usual
authority of a purser.
- No. 4. Yes.
- No. 5. They were made out at the various canner-
ies at the time the various shipments
were taken on board.
- No. 6. Yes.
- No. 7. I do not remember having taken any ex-
ceptions.
- No. 8. They were prepared and signed by myself.
- No. 9. I don’t know any reason why Captain
Karbbe should sign them.
- No. 10. One copy was to the watchman in charge
at each of the three canneries. I may
have mailed a copy of the bills of lad-
ing to the cannery companies below;
but I don’t remember at this time. A
retain copy was kept by the ship and
one copy was turned into the steam-
ship office at Seattle.
- No. 11. I did not tell Mr. Burckhardt that no cop-
ies were left at the different canneries.
As stated before, there was one copy
given to each watchman at the respec-

tive canneries. The rest of the question with this exception I answer in the affirmative.

No. 12. I left a copy of the bill of lading with each of the watchmen as stated in my answer to Cross-interrogatory No. 11, and I think I mailed a copy to the canning companies below. [415]

[Banbury Exhibit No. 1.]

ORIGINAL SHIPPING ORDER.

Chilkoot Wharf.

Dec. 19, 1912.

Delivered to W. F. Swan & Co. (hereinafter named Carrier) by Ala. Pacific Fisheries to be forwarded by S. S. Jeanie or by some other barge or steamer owned or controlled by said Carrier, the property enumerated hereon, same being apparently in good order except as otherwise noted, the value, weight, quantity, quality and condition of contents being unknown to said Carrier, and to be forwarded with such dispatch as the general business of the Carrier will permit and delivered at vessel's tackle at the port or landing of Seattle in like good order as received (but with the option to the master to carry the property on deck, to deviate and to lighter, transship, land and reship the said property or any part thereof, and to stop and land and to receive passengers and freight at intermediate ports or places) unto the consignee, or if shipment is to be carried beyond above-named port or landing, to connecting Carrier or forwarder, he or they paying

freight at tariff rates (unless otherwise agreed) on delivery, and charges advanced by Carrier and average, and to secure the payment of freight and charges the said property is hereby pledged to the Carrier. The said property to be received, held, carried and delivered by said Carrier, subject to all the stipulations and conditions hereon and on the reverse side hereof under which conditions rates are quoted and property is received for transportation, and to all of which the shipper hereby agrees; and Notice of arrival of said goods at said port is hereby waived.

Name of consignee—Kelly Clarke.

Destination—Seattle.

Marked.

N. B. Shipments must not be accepted until all above blanks are properly filled. Consignments to Order must not be accepted unless name of some resident is given to notify of arrival. Freight must be marked with proper shipping mark and full name of place of destination—initials not accepted; such terms as “Mdse.,” “Sundries,” etc., must not be used in place of proper descriptive details. [416]

No. of Pkgs.	Articles.	Weight.	Feet.
		Subject to Correction.	
3077	c/s Trolling Brand Salmon	1#	
5903	Spear “ “	1#	
1658	Coho-Mkd C	A V	
10638	M		

T. BANBURY,
Purser.

Banbury Exhibit “I.” A. W. F.

Agent or Wharfinger.

Shippers desiring lower rates, when such are conditional upon shipments being released or at Owner's Risk, or upon valuation, must sign release clause on the back hereof. [417]

CONDITIONS.

The barge or steamers on which the property herein described shall be forwarded, shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamers owned or controlled by said Carrier; to lighter from steamer to steamer, or to and from steamer and shore; to transfer to and from hulks, to ship by other carrier or conveyance goods destined for ports or places off the route, or beyond the port of discharge of said steamer, but under no circumstances shall the carrier be held responsible for any damage to or loss of said property after the same shall be unhooked from the vessel's tackle.

The Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters, 'by fire from any cause and wheresoever occurring; by barratry of the master or crew, by enemies, pirates, robbers, by arrest and restraint of princes, rulers, or people, riots, strikes or stoppage of labor, by explosion, bursting of boilers, breakage of shafts, or any patent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owner, not resulting, however, in any case, from want

of due diligence by the owners of the ship or any of them.

The Carrier shall not be responsible for leakage of oils, liquor or other liquids, breakage of glass or queensware, injury to or breakage of glass, looking-glasses, show-cases or picture frames, stoves, hollow-ware, or other frail castings, or for breakage of any property packed in boxes, barrels, crates or bales when such packages do not present evidence of rough handling or improper stowage, or for any injury to the hidden contents of packages, or for breakage resulting from the fragile nature of the freight, or from chafing, wet or rust, resulting from the imperfect or insecure packing or insufficient cooperage, or the result of shipping without packing; or for loss in weight of coffee, grain or any other freight packed in bags, or for loss in weight of rice in tierces, sugar in barrels, or for the decay of perishable articles, or damage to any article [418] arising from the effect of heat or cold, sweating or fermentation or by reason of its own inherent vice or liability, or for loss or damage resulting from providential causes, or for damage to tobacco caused by stains to packages or by sweating or fermentation; or damage to cargo by vermin, burning, or explosion of articles on freight or otherwise, or loss, or damage on account of inaccuracy or omissions in marks or descriptions, or from unavoidable detention or delay; nor for loss of specie, bullion, bank notes, government notes, bonds or consuls, jewelry or any property of special value, unless shipped under its proper title or name, and extra freight paid thereon.

Livestock to be carried at owner's risk. Pelts, dry hides, butter and eggs, boxes, and other packages, must be each and every package marked with the full address of the consignee, and if not so marked, it is agreed that the delivery of the full number of packages, without regard to quality, shall be deemed a correct delivery and in full satisfaction of this receipt.

Advance charges shall be paid to Carrier, vessel or property lost or not lost at any stage of the entire transit, and if freight and charges are not paid within thirty days after notice to consignee of arrival of vessel at port or place of destination, the Carrier may sell the said property at public or private sale and apply the proceeds in payment of freight, storage and all other charges; or the master may dispose at any time of any article of a perishable nature when in his opinion the said article would become decayed or worthless before they could be delivered to the consignee or owner.

The property shall be received by the consignees thereof at the vessel's tackle immediately on arrival of the vessel at the port or place of delivery, without regard to weather; if the consignee is not on hand to receive the property, as discharged, then the Carrier may deliver it to the wharfinger, or other party or person believed by said Carrier to be responsible, and who will take charge of said property and pay freight on same, or the same may be kept on board or landed and stored in hulks, or put in lighters, by the Carriers, at the expense and risk of the owner, [419] shipper or consignee, and at his or their

risk of any nature whatever. And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent, be conveyed upon said vessel to the contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property.

nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of this

The person or party delivering any property to the said vessel or Carrier for shipment, is authorized to sign the shipping receipt for the shipper. The Carrier shall in no event be liable for any injury to said property, or for any damage or loss suffered by the owner, or by the consignee thereof, unless its negligence or the negligence of its officers or servants shall have occasioned the same; and in the event that the Carrier shall become liable for any such injury, damage or loss, it shall have the benefit of any insurance procured on the said property. The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the ship at the custom house. On delivery of the property enumerated as provided herein, this receipt shall stand canceled, whether surrendered or not.

All claims for damage to or loss of any property to be presented to the Carrier or the nearest agent thereof within ten days from date of notice thereof—

the arrival of vessel at port or place of discharge, or the knowledge of the stranding or loss of vessel to be deemed notice,—and that after sixty days from such date no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property; and a failure to present such claim within said ten days, or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said Carrier or any of the stockholders thereof, for any damage or loss. Claim for loss or of damage to any of the said property shall be restricted to the cash value of the same at the port of shipment at the date of shipment.

On the happening of any accident, whereby the steamer shall become [420] disabled, the Carrier is hereby authorized to forward the freight or property to the port of delivery by other conveyances at the option of the master, and shall receive extra compensation for such service whether performed by the Carrier's own vessel or those of strangers; and in case of salvage service rendered to the freight or property during the voyage by a vessel or vessels of the said Carrier, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

The Carrier shall not be required to deliver the property at the port of delivery in any specific or particular time, or to meet any particular market.

The Carrier shall not be held liable or responsible for any loss or damage resulting from the nondelivery or misdelivery of property, on account of its

not being properly marked with shipping mark and name of port of delivery, and should it be found on the cargo being discharged, that goods have been landed without marks, or with marks differing from those on the shipping receipt, or with marks and numbers not distinguishable, the same shall be apportioned to the different incomplete or short consignment lots, and consignees shall conform to such allotment.

It is understood that the Carrier's vessels are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can secure it; and the Carrier shall not be liable for loss, detention or damage arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel, provided reasonable measures have been taken to secure efficiency.

In case the barge or steamer shall be prevented from reaching her destination by quarantine, the Carrier may discharge the property into any depot, lazzaretto or other receptable, and such discharge shall be deemed a final delivery, and all quarantine expenses of whatsoever kind on the property shall be borne by the owner thereof and shall be a lien thereon.

General average shall be computed and payable according to the York-Antwerp rules of 1890 or according to American rules, as the Carrier may elect. [421]

In all cases when the word Carrier is used herein as representing or as in place of the Alaska Barge

Co. it is also understood to cover and include its stockholders and vessels and the masters thereof.

These conditions and stipulations to run to all connecting water carriers and the delivery of property or freight to a connecting carrier by land shall be understood as an acceptance by the shipper and owner of the conditions and stipulations of such shipping receipt as is used by connecting Carrier in its local business at the place of transfer.

OWNER'S RISK OR RELEASE.—When rate is named subject to owner's risk, which means that shippers assume responsibility for all damage to property in transit not arising from gross negligence of carriers, shipper must write below, the words indicating whether of breakage, chafing, leakage, etc. When two rates are provided, the lower conditioned on release, the Release Clause below must be signed by shipper, otherwise higher rate will be charged.

VALUATION.—When rate is conditioned on valuation, shipper must express on release below valuation under which they desire to ship.

RELEASE.

I hereby certify that I desire to receive the benefits of any lower rates provided for freight conditional upon carriers being released or at Owner's Risk of *——— or at value of ——— per ——— and in consideration of such lower rates being ap—

*Special attention is called to above clauses referring to owner's risk or release, and valuation.

plied on the within-named shipment, I hereby assume all risk necessary to receive such benefits.

Shippers will sign here.

Shipper.

[Banbury Exhibit No. 2.]

ORIGINAL SHIPPING RECEIPT

Yes Bay Wharf.

12/31, 1912.

Received by Alaska Barge Company (hereinafter named Carrier) from Ala. Pacific Fisheries to be forwarded by S. S. | Jeanie or by some other barge or steamer owned or controlled by said Carrier, the property enumerated hereon, same being apparently in good order except as otherwise noted, the value, weight, quantity, quality and condition of contents being unknown to said Carrier, and to be forwarded with such dispatch as the general business of the Carrier will permit and delivered at vessel's tackle at the port or landing of Seattle in like good order as received (but with the option to the master to carry the property on deck, to deviate and to lighter, transship, land and reshipe the said property or any part thereof, and to stop and land and to receive passengers and freight at intermediate ports or places) unto the consignee, or if shipment is to be carried beyond above-named port or landing, to connecting Carrier or forwarder, he or they paying freight at tariff rates (unless otherwise agreed) on delivery, and charges advanced by Carrier and average, and to secure the payment of freight and charges the said property is hereby pledged to the Carrier. The

said property to be received, held, carried and delivered by said Carrier, subject to all the stipulations and conditions hereon and on the reverse side hereof under which conditions rates are quoted and property is received for transportation, and to all of which the shipper hereby agrees; and Notice of arrival of said goods at said port is hereby waived.

Name of Consignee—Kelly Clarke Co.

Destination—Seattle.

Marked.

N. B. Shipments must not be accepted until all above blanks are properly filled. Consignments to Order must not be accepted unless name of some resident is given to notify of arrival. Freight must be marked with proper shipping mark and full name of place of destination—initials not accepted, such terms as “Mdse,” “Sundries,” etc., must not be used in place of proper descriptive details. [423]

No. of Pkgs.	Articles.	Weight. Subject to Correction.	Feet.
3124 c/s	Empire Brand		
4427 “	Mandarin “		
960 “	Surf “		
4001 “	Victor “		
1052 “	Spear “		
463 “	Trolling “		
<hr/>			
14027			

Banbury Exhibit 2. A. W. F.

Agent or Wharfinger.

Shippers desiring lower rates, when such are conditional upon shipments being released or at Owner's Risk, or upon valuation, must sign release clause on the back hereof. [424]

CONDITIONS

The barge or steamers on which the property herein described shall be forwarded, shall have leave to tow and assist vessels; to sail with or without pilots; to transship to any other steamers owned or controlled by said Carrier; to lighter from steamer to steamer, or to and from steamer and shore; to transfer to and from hulks, to ship by other carrier or conveyance goods destined for ports or places off the route, or beyond the port of discharge of said steamer, but under no circumstances shall the Carrier be held responsible for any damage to or loss of said property after the same shall be unhooked from the vessel's tackle.

The Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters, by fire from any cause and wheresoever occurring; by barratry of the master or crew, by enemies, pirates, robbers, by arrest and restraint of princes, rulers, or people, riots, strikes or stoppage of labor, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them.

The Carrier shall not be responsible for leakage of oils, liquor or other liquids, breakage of glass or queensware, injury to or breakage of glass, looking

glasses, show cases or picture frames, stoves, hollow-ware, or other frail castings, or for breakage of any property packed in boxes, barrels, crates or bales when such packages do not present evidence of rough handling or improper stowage, or for any injury to the hidden contents of packages, or for breakage resulting from the fragile nature of the freight, or from chafing, wet or rust, resulting from the imperfect or insecure packing or insufficient cooperage, or the result of shipping without packing; or for loss in weight of coffee, grain or any other freight packed in bags, or for loss in weight of rice in tierces, sugar in barrels, or for the decay of perishable articles, or damage to any article [425] arising from the effect of heat or cold, sweating or fermentation or by reason of its own inherent vice or liability, or for loss or damage resulting from providential causes, or for damage to tobacco caused by stains to packages or by sweating or fermentation; or damage to cargo by vermin, burning, or explosion of articles on freight or otherwise, or loss, or damage on account of inaccuracy or omissions in marks or descriptions, or from unavoidable detention or delay; nor for loss of specie, bullion, bank notes, government notes, bonds or consuls, jewelry or any property of special value, unless shipped under its proper title or name, and extra freight paid thereon.

Live stock to be carried at owner's risk. Pelts, dry hides, butter and eggs, boxes, and other packages, must be each and every package marked with the full address of the consignee, and if not so marked, it is

agreed that the delivery of the full number of packages, without regard to quality, shall be deemed a correct delivery and in full satisfaction of this receipt.

Advance charges shall be paid to Carrier, vessel or property lost or not lost at any stage of the entire transit, and if freight and charges are not paid within thirty days after notice to consignee of arrival of vessel at port or place of destination, the Carrier may sell the said property at public or private sale and apply the proceeds in payment of freight, storage and all other charges; or the master may dispose at any time of any article of a perishable nature when in his opinion the said articles would become decayed or worthless before they could be delivered to the consignee or owner.

The property shall be received by the consignees thereof at the vessel's tackle immediately on arrival of the vessel at the port or place of delivery, without regard to weather; if the consignee is not on hand to receive the property, as discharged, then the Carrier may deliver it to the wharfinger, or other party or person believed by said Carrier to be responsible, and who will take charge of said property and pay freight on same, or the same may be kept on board or landed and stored in hulks, or put in lighters, by the Carriers, at the expense and risk of the owner, [426] shipper or consignee, and at his or their risk of any nature whatever. And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of

her cargo there, the said property may, at the option of the master or agent, be conveyed, upon said vessel to the contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property.

nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of this

The person or party delivering any property to the said vessel or Carrier for shipment, is authorized to sign the shipping receipt for the shipper. The Carrier shall in no event be liable for any injury to said property, or for any damage or loss suffered by the owner, or by the consignee thereof, unless its negligence or the negligence of its officers or servants shall have occasioned the same; and in the event that the Carrier shall become liable for any such injury, damage or loss, it shall have the benefit of any insurance procured on the said property. The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the ship at the custom house. On delivery of the property enumerated as provided herein, this receipt shall stand cancelled, whether surrendered or not.

All claims for damage to or loss of any property to be presented to the Carrier or the nearest Agent thereof within ten days from date of notice thereof—the arrival at port or place of discharge, or the knowledge of the stranding or loss of vessel to be deemed notice,—and that after sixty days from such date no action, suit or proceeding in any court of

justice shall be brought for any damage to or loss of said property; and a failure to present such claim within said ten days, or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said Carrier or any of the stockholders thereof, for any damage or loss. Claim for loss or of damage to any of the said property shall be restricted to the cash value of same at the port of shipment at the date of shipment.

On the happening of any accident, whereby the steamer shall become [427] disabled, the Carrier is hereby authorized to forward the freight or property to the port of delivery by other conveyances at the option of the master, and shall receive extra compensation for such service whether performed by the Carrier's own vessels or those of strangers; and in case of salvage service rendered to the freight or property during the voyage by a vessel or vessels of the said Carrier, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

The Carrier shall not be required to deliver the property at the port of delivery in any specific or particular time, or to meet any particular market.

The Carrier shall not be held liable or responsible for any loss or damage resulting from the non-delivery or misdelivery of property, on account of its not being properly marked with shipping mark and name of port of delivery, and should it be found on the cargo being discharged that goods have been landed without marks, or with marks differing from

those on the shipping receipt, or with marks and numbers not distinguishable, the same shall be apportioned to the different incomplete or short consignment lots, and consignees shall conform to such allotment.

It is understood that the Carrier's vessels are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can secure it; and the Carrier shall not be liable for loss, detention or damage arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel, provided reasonable measures have been taken to secure efficiency.

In case the barge or steamer shall be prevented from reaching her destination by quarantine, the Carrier may discharge the property into any depot, lazzaretto or other receptacle, and such discharge shall be deemed a final delivery, and all quarantine expenses of whatsoever kind on the property shall be borne by the owner thereof and shall be a lien thereon.

General average shall be computed and payable according to the York-Antwerp rules of 1890, or according to American rules, as the Carrier may elect.
[428]

In all cases when the word Carrier is used herein as representing or as in place of the Alaska Barge Co. it is also understood to cover and include its stockholders and vessels and the masters thereof.

These conditions and stipulations to run to all connecting water Carriers and the delivery of prop-

erty of freight to a connecting Carrier by land shall be understood as an acceptance by the shipper and owner of the conditions and stipulations of such shipping receipt as is used by connecting Carrier in its local business at the place of transfer.

OWNER'S RISK OR RELEASE—When rate is named subject to owner's risk, which means that shippers assume responsibility for all damage to property in transit not arising from gross negligence of carriers, shipper must write below, the words indicating whether of breakage, chafing, leakage, etc. When two rates are provided, the lower conditioned on release, the Release Clause below must be signed by shipper, otherwise higher rate will be charged.

VALUATION—When rate is conditioned on valuation, shipper must express on release below valuation under which they desire to ship.

RELEASE

I hereby certify that I desire to receive the benefits of any lower rates provided for freight conditional upon carriers being released or at Owner's Risk of * or at value of per and in consideration of such lower rates being applied on the within-named shipment, I hereby assume all risk necessary to receive such benefits.

Shippers will sign here.

Shipper.

*Special attention is called to above clauses referring to owner's risk or release, and valuation.

[Banbury Exhibit No. 3.]**ORIGINAL SHIPPING RECEIPT****Chomly Wharf.**

Received by Alaska Barge Company (hereinafter named Carrier) from Ala. Pacific Fisheries to be forwarded by S. S. Jeanie or by some other barge or steamer owned or controlled by said Carrier. the property enumerated hereon, same being apparently in good order except as otherwise noted, the value, weight, quantity, quality and condition of contents being unknown to said Carrier, and to be forwarded with such dispatch as the general business of the Carrier will permit and delivered at vessel's tackle at the port or landing of Seattle in like good order as received (but with the option to the master to carry the property on deck, to deviate and to lighter, transship, land and reship the said property or any part thereof, and to stop and land and to receive passengers and freight at intermediate ports or places) unto the consignee, or if shipment is to be carried beyond above-named port or landing, to connecting Carrier or forwarder, he or they paying freight at tariff rates (unless otherwise agreed) on delivery, and charges advanced by Carrier and average, and to secure the payment of freight and charges the said property is hereby pledged to the Carrier. The said property to be received, held, carried and delivered by said Carrier, subject to all the stipulations and conditions hereon and on the reverse side hereof under which conditions rates are quoted and property is received for transportation,

and to all of which the shipper hereby agrees; and Notice of arrival of said goods at said port is hereby waived.

Name of Consignee—Kelly Clarke.

Destination—Seattle.

Marked.

N. B. Shipments must not be accepted until all above blanks are properly filled. Consignments to Order must not be accepted unless name of some resident is given to notify of arrival. Freight must be marked with proper shipping mark and full name of place of destination—initials not accepted, such terms as “Mdse,” “Sundries,” etc., must not be used in place of proper descriptive details. [430]

No. of Pkgs.	Articles.	Weight.	Feet.
		Subject to Correction.	
2500 c/s	Bugle Brand Salmon		
2500 “	Victor “ “		
<hr/>			
5000			

Banbury Exhibit 3. A. W. F. [431]

CONDITIONS.

The barge or steamers on which the property herein described shall be forwarded, shall have leave to tow and assist vessels; to sail with or without pilots; to transship to any other steamers owned or controlled by said Carrier; to lighter from steamer to steamer, or to and from steamer and shore; to transfer to and from hulks, to ship by other carrier or conveyance goods destined for ports or places off the route, or beyond the port of discharge of said steamer, but under no circumstances shall the Carrier be held responsible for any damage to or loss of said property after the same shall be unhooked from the vessel's tackle.

The Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters, by fire from any cause and wheresoever occurring; by barratry of the master or crew, by enemies, pirates, robbers, by arrest and restraint of princes, rulers, or people, riots, strikes or stoppage of labor, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them.

The Carrier shall not be responsible for leakage of oils, liquor or other liquids, breakage of glass or queensware, injury to or breakage of glass, looking glasses, show cases or picture frames, stoves, hollow-ware or other frail castings, or for breakage of any property packed in boxes, barrels, crates or bales when such packages do not present evidence of rough handling or improper stowage, or for any injury to the hidden contents of packages, or for breakage resulting from the fragile nature of the freight, or from chafing, wet or rust, resulting from the imperfect or insecure packing or insufficient cooperage, or the result of shipping without packing; or for loss in weight of coffee, grain or any other freight packed in bags, or for loss in weight of rice in tierces, sugar in barrels, or for the decay of perishable articles, or damage to any article [432]

arising from the effect of heat or cold, sweating or fermentation or by reason of its own inherent vice or liability, or for loss or damage resulting from providential causes, or for damage to tobacco caused by stains to packages or by sweating or fermentation; or damage to cargo by vermin, burning, or explosion of articles on freight or otherwise, or loss, or damage on account of inaccuracy or omissions in marks or descriptions, or from unavoidable detention or delay; nor for loss of specie, bullion, bank notes, government notes, bonds or consuls, jewelry or any property of special value, unless shipped under its proper title or name, and extra freight paid thereon.

Live stock to be carried at owner's risk. Pelts, dry hides, butter and eggs, boxes, and other packages, must be each and every package marked with the full address of the consignee, and if not so marked, it is agreed that the delivery of the full number of packages, without regard to quality, shall be deemed a correct delivery and in full satisfaction of this receipt.

Advance charges shall be paid to Carrier, vessel or property lost or not lost at any stage of the entire transit, and if freight and charges are not paid within thirty days after notice to consignee of arrival of vessel at port or place of destination, the Carrier may sell the said property at public or private sale and apply the proceeds in payment of freight, storage and all other charges; or the master may dispose at any time of any article of a perishable nature when in his opinion the said articles would become decayed or worthless before they could be

delivered to the consignee or owner.

The property shall be received by the consignees thereof at the vessel's tackle immediately on arrival of the vessel at the port or place of delivery, without regard to weather; if the consignee is not on hand to receive the property, as discharged, then the Carrier may deliver it to the wharfinger, or other party or person, believed by said Carrier to be responsible, and who will take charge of said property and pay freight on same, or the same may be kept on board or landed and stored in hulks, or put in lighters, by the Carriers, at the expense and risk of the owner.

[433] shipper or consignee, and at his or their risk of any nature whatever. And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent, be conveyed upon said vessel to the contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property.

nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of this

The person or party delivering any property to the said vessel or Carrier for shipment, is authorized to sign the shipping receipt for the shipper. The Carrier shall in no event be liable for any injury to said property, or for any damage or loss suffered by the owner, or by the consignee thereof, unless its negligence or the negligence of its officers or ser-

vants shall have occasioned the same; and in the event that the Carrier shall become liable for any such injury, damage or loss, it shall have the benefit of any insurance procured on the said property. The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the ship at the custom house. On delivery of the property enumerated as provided herein, this receipt shall stand canceled, whether surrendered or not.

All claims for damage to or loss of any property to be presented to the Carrier or the nearest Agent thereof within ten days from date of notice thereof—the arrival of vessel at port or place of discharge, or the knowledge of the stranding or loss of vessel to be deemed notice—and that after sixty days from such date no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property; and a failure to present such claim within said ten days, or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said Carrier or any of the stockholders thereof, for any damage or loss. Claim for loss or of damage to any of the said property shall be restricted to the cash value of same at the port of shipment at the date of shipment.

On the happening of any accident, whereby the steamer shall become [434] disabled, the Carrier is hereby authorized to forward the freight or property to the port of delivery by other conveyances at the option of the master, and shall receive extra com-

pensation for such service whether performed by the Carrier's own vessels or those of strangers; and in case of salvage service rendered to the freight or property during the voyage by a vessel or vessels of the said Carrier, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

The Carrier shall not be required to deliver the property at the port of delivery in any specific or particular time, or to meet any particular market.

The Carrier shall not be held liable or responsible for any loss or damage resulting from the non-delivery or misdelivery of property, on account of its not being properly marked with shipping mark and name of port of delivery, and should it be found on the cargo being discharged, that goods have been landed without marks, or with marks differing from those of the shipping receipt, or with marks and numbers being not distinguishable, the same shall be apportioned to the different incomplete or short consignment lots, and consignees shall conform to such allotment.

It is understood that the Carrier's vessels are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can secure it; and the Carrier shall not be liable for loss, detention or damage arising directly or indirectly from latent defects in boilers, machinery or any part of the vessel, provided reasonable measures have been taken to secure efficiency.

In case the barge or steamer shall be prevented

from reaching her destination by quarantine, the carrier may discharge the property into any depot, lazaretto or other receptacle, and such discharge shall be deemed a final delivery, and all quarantine expenses of whatsoever kind on the property shall be borne by the owner thereof and shall be a lien thereon.

General average shall be computed and payable according to the York-Antwerp rules of 1890, or according to American rules, as the Carrier may elect. [435]

In all cases when the word Carrier is used herein as representing or as in place of the Alaska Barge Co. it is also understood to cover and include its stockholders and vessels and the masters thereof.

These conditions and stipulations to run to all connecting water carriers and the delivery of property or freight to a connecting carrier by land shall be understood as an acceptance by the shipper and owner of the conditions and stipulations of such shipping receipt as is used by connecting Carrier in its local business at the place of transfer.

OWNER'S RISK OR RELEASE—When rate is named subject to owner's risk, which means that shippers assume responsibility for all damage to property in transit not arising from gross negligence of carriers, shipper must write below, the words indicating whether of breakage, chafing, leakage, etc. When two rates are provided, the lower conditioned on release, the Release Clause below must be signed by shipper, otherwise higher rate will be charged.

VALUATION—When rate is conditioned on val-

uation, shipper must express on release below valuation under which they desire to ship.

RELEASE.

I hereby certify that I desire to receive the benefits of any lower rates provided for freight conditional upon carriers being released or at Owner's Risk of* ——— or at value of ——— per ——— and in consideration of such lower rates being applied on the within named shipment, I hereby assume all risk necessary to receive such benefits.

Shippers will sign here.

_____,
Shipper.

United States of America,
Territory of Alaska,—ss.

I, A. W. Fox, a notary public in and for the Territory of Alaska, an officer duly authorized to administer oaths in said Territory do hereby certify that the above and foregoing deposition of T. Banbury, was taken before me at Juneau on the 13th day of January, 1915, in pursuance of the stipulation hereto annexed; that before the said deposition was so taken said witness was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in said cause; that thereupon I propounded to said witness the annexed and foregoing direct and cross-interrogatories to be propounded to such wit-

*Special attention is called to above clauses referring to owner's risk or release, and valuation.

ness, and thereupon the answers of said witness to the said interrogatories and cross-interrogatories so propounded to him were by me taken in shorthand and thereafter transcribed in typewriting and are attached hereto and returned herewith; and I do further certify that I am not counsel nor attorney for either of the parties in said depositions and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and affixed my official seal this 16th day of January, 1915.

[Seal]

A. W. FOX,

Notary Public for Alaska.

My commission expires May 27th, 1918. [437]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

S. S. "JEANIE," Her Tackle, etc.,
Respondent,

ALASKA COAST COMPANY,
Claimant.

Stipulation to Take Testimony at Juneau, Alaska.

It is hereby stipulated and agreed by and between proctors for the parties hereto that the deposition of T. Banbury, a witness on behalf of respondent and

claimant may be taken before A. W. Fox, a notary public residing at Juneau, Alaska, at his office in the Seward Building in said city, at such time as may be convenient to said notary public, and said witness upon the interrogatories and cross-interrogatories attached hereto.

It is further stipulated and agreed that after the witness deposing pursuant hereto has been duly cautioned and sworn that his testimony may be taken in shorthand and transcribed, and after being so transcribed may be returned to the above-entitled court without being subscribed by the witness, the signature of the witness thereto being expressly waived.

It is further stipulated and agreed that such testimony may be considered and used in evidence in this cause subject to all objections except as to form of the questions.

It is further stipulated and agreed that upon the completion of the taking of such deposition, the said notary public shall return the same in a sealed envelope together with this stipulation and the interrogatories and cross-interrogatories attached hereto to the above-entitled court, addressing the same [438] to "Hon. Frank Crosby, Clerk of the District Court of the United States for the Western District of Washington, Seattle, Washington," and writing across the end of the envelope the title of said cause and "Deposition of T. Banbury, witness for Claimant."

Done this 31st day of December, 1914.

KERR & McCORD,
C. H. HANFORD,
Proctors for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Respondent and Claimant. [439]

[Deposition of Thomas Banbury, for Claimant.]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

S. S. "JEANIE," Her Tackle, etc.,
Respondent.

ALASKA COAST COMPANY,
Claimant.

DIRECT INTERROGATORIES.

Interrogatories to be administered to T. Banbury, a witness to be produced, sworn and examined in a certain cause of Admiralty and Maritime jurisdiction now pending in the District Court of the United States for the Western District of Washington, Northern Division, wherein Alaska Pacific Fisheries, a corporation, is libelant against the steamship "Jeanie" her tackle, etc., is respondent, and the Alaska Coast Company, a corporation, is claimant, on the part and behalf of claimant.

(Deposition of Thomas Banbury.)

Interrogatory No. 1.

State your name, age, place of residence and present business or profession.

Interrogatory No. 2.

What business or profession were you engaged in in the year 1912?

State whether or not you were aboard the S. S. "Jeanie" in December, 1912, and January, 1913.

Interrogatory No. 3.

[440]

Interrogatory No. 4.

If you answer interrogatory 3 in the affirmative, state in what trade the S. S. "Jeanie" was engaged at said time and what position you held aboard said vessel at said time.

Interrogatory No. 5.

If in answer to fourth interrogatory you state that you held the position of purser aboard the "Jeanie," state in a general way the duties of that position aboard the "Jeanie."

Interrogatory No. 6.

Was it your custom or a part of your duty, as such purser, to execute bills of lading or shipping receipts for cargo taken aboard the "Jeanie" during the course of her voyage?

Interrogatory No. 7.

Referring to three documents attached hereto, numbered in the upper left hand corner with numerals 37, 38 and 39, respectively, the first or number 37 being dated Dec. 19, 1912, Chilkoot Wharf, the second or number 38, being dated Dec. 31, 1912,

(Deposition of Thomas Banbury.)

Yes Bay Wharf, and the third or number 39, being dated Jan. 2, 1913, Chomly Wharf, and state whether or not the said three documents are in your hand-writing—that is the written portion thereof as distinguished from the printed matter.

Interrogatory No. 8.

If you answer preceding interrogatory in the affirmative, state whether or not you can identify said documents as documents having been issued by you. If so, have the notary public mark the said documents as “Banbury’s Exhibit 1,” “Banbury’s Exhibit 2” and “Banbury’s Exhibit 3,” respectively, and return the same as a part of your testimony herein.

Interrogatory No. 9.

If in answer to interrogatory 8, you identify the [441] said documents and have had the same marked as requested, state where and for what purpose document marked “Banbury’s Exhibit 1” was executed, also whether or not the same is an original or a copy—also number of copies made by you—and disposition of both original and copies, that is to whom delivered.

Interrogatory No. 10.

Give the same information as to documents numbered 38 and 39, which you were requested in interrogatory 8 to have marked “Banbury’s Exhibit 2” and “Banbury’s Exhibit 3,” respectively.

Interrogatory No. 11.

If in answer to interrogatories 9 and 10, you state that either the original or a copy of documents

(Deposition of Thomas Banbury.)

marked "Banbury's Exhibit 1," "Banbury's Exhibit 2" and "Banbury's Exhibit 3" were delivered to the agent or representative of the shipper of the goods or merchandise shown on the said documents at the places, where the same was shipped, that is Chilkoot, Yes Bay and Chomly respectively, state if you know the name of such person or persons and their official position with the shipper, if any.

Interrogatory No. 12.

If in answer to preceding interrogatory, you are unable to give the name or official position of such persons, state if there were any other persons at such places and if so whether or not the person to whom you delivered said documents (if you testify that you did deliver them) represented himself as the agent of the shipper?

Interrogatory No. 13.

Who checked the number of cases of salmon put aboard the "Jeanie" at the places mentioned in the attached shipping receipts on behalf of the shipper or owner of the cargo? [442]

Interrogatory No. 14.

If you identify such documents as having been issued by you state whether or not documents numbered 38 and 39 are copies, and if so state whether the originals were in same form as document numbered 37. Was the name Alaska Barge Company printed in heavy type on 38 and 39 crossed out and "W. F. Swan Co." written in in pencil as appears on 37, or not?

(Deposition of Thomas Banbury.)

Interrogatory No. 15.

Were you in the employ of the "Alaska Barge Company" or the "W. F. Swan Co." on this trip of the "Jeanie"?

Interrogatory No. 16.

State, if you remember, the conditions of weather encountered by the S. S. "Jeanie" on the trip in question.

Interrogatory No. 17.

Did the "Jeanie" encounter any rough weather prior to her arrival at Chilkoot, Alaska, if so what was the extent of same?

Interrogatory No. 18.

State if you know whether the "Jeanie" was leaking or taking in any unusual amount of water on her north-bound voyage prior to arriving at Chilkoot.

Interrogatory No. 19.

Did the "Jeanie" encounter any rough weather after leaving Chilkoot prior to her arrival at Yes Bay, Alaska? If so, state the extent of same, where encountered and length of time the ship was in the said weather.

Interrogatory No. 20.

Did the "Jeanie" encounter any rough weather on her south bound voyage—after leaving Ketchikan? If so state the extent and duration of same.

Interrogatory No. 21. [443]

State if you know the precaution, if any, taken by the officers and crew of the "Jeanie" to clean out the ship's holds and 'tween decks prior to taking aboard salmon on this voyage.

(Deposition of Thomas Banbury.)

Interrogatory No. 22.

Did you know or have any means of knowing the condition of the cans, labels, etc., inside the salmon cases at the time the same was loaded aboard the "Jeanie," on this voyage, at the various canneries?

Interrogatory No. 23.

State if you know the condition of the S. S. "Jeanie" at the time of leaving Seattle and also at the time of arriving at Chilkoot, Alaska, on this voyage, as to her seaworthiness or not.

Interrogatory No. 24.

State if you know the number of tarpaulins used in covering different hatches of the "Jeanie" after cargo was loaded and condition of same. [444]

**CROSS-INTERROGATORIES TO BE PRO-
POUNDED TO AND ANSWERED UNDER
OATH BY THE WITNESS, T. BANBURY.**

1. Were you, during the time of your service as purser of the steamship "Jeanie," an officer, stockholder, agent or employee of the Alaska Coast Company, owner of said steamship?

If yea, state what your relationship was to said Company, and particularly with reference to the time of the voyage of said steamship from Seattle to Alaska and return in the months of December, 1912, and January, 1913.

2. By whom were you employed as purser of the "Jeanie"?

3. Did you, during the time of the voyage specified in Cross Interrogatory Number 1, have any authority to act for, or represent said steamship

(Deposition of Thomas Banbury.)

“Jeanie,” her owner, or charterer, or charterers, other than the authority pertaining to the office of purser of a steamship?

If yea, state the particulars as to the nature and extent of such other or additional authority, and by whom in what manner conferred; if you had written authorization, produce the writing, if you are able to do so.

4. If any bills of lading were issued on shipments of cases of canned salmon by the Alaska Pacific Fisheries from Chilkoot, Yes Bay and Chomly on the return trip of the “Jeannie” in December, 1912, and January, 1913, did you, yourself make out such bills of lading, or write therein, specifying the number of cases and brands of each shipment? [445]

5. State when and where such bills of lading, if any, were made up and signed.

6. When the cases of salmon were being taken on board the “Jeannie” at Chilkoot, Yes Bay and Chomly, did you personally count the number of cases received, and observe the apparent condition of same?

7. Have you any knowledge with respect to any of the cans of salmon in the cases in either of the warehouses or canneries at Chilkoot, Yes Bay or Chomly, being wet or not in good order fit for transportation?

If yea, state the particulars.

8. If bills of lading for the salmon received at Chilkoot, Yes Bay and Chomly were prepared, were they signed?

If yea, who signed them?

(Deposition of Thomas Banbury.)

9. If you know any reason for Captain Karbbe's failure to sign bills of lading for the salmon received at Chilkoot, Yes Bay and Chomly, state what it was.

10. If bills of lading for the salmon received at Chilkoot, Yes Bay and Chomly were signed by yourself, state when, where, and to whom they were delivered.

11. Did you inform F. O. Burckhardt in a conversation recently at Juneau, that bills of lading for the shipments of salmon received at Chilkoot, Yes Bay and Chomly were not delivered to anyone at either of said places, and that you were uncertain whether you delivered such bills of lading, after the arrival of the "Jeannie" at Seattle, to anyone representing the Alaska Pacific Fisheries, or the consignees, or that they may have been given to W. F. Swan to be by him delivered?

12. Give your version of the conversation, if any, [446] between you and F. O. Burckhardt at Juneau during November or the early part of December, 1914, with respect to bills of lading for said shipments of salmon.

[Indorsed]: Stipulation to Take Testimony at Juneau, Alaska. Direct Interrogatories. Deposition of T. Banbury, Witness for Claimant. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 22, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. Order publishing this deposition filed May 11, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [447]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2570.

ALASKA FISHERIES COMPANY, a Corpora-
tion,

Libelant,

vs.

THE STEAMSHIP "JEANIE," Her Tackle, Ap-
parel, Furniture, etc.,

Respondent.

Stipulation as to Facts.

IT IS HEREBY STIPULATED that to avoid
the necessity for producing evidence to prove the
same, the following facts are admitted.

C. H. HANFORD,

KERR & McCORD,

Attorneys for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Respondent. [448]

In the month of December, 1912, the steamship
"Jeanie," going northward on a voyage from Se-
attle to Alaska and return, was grounded in Wrangell
Narrows and held several hours, until the first high
tide thereafter, when she was pulled off by her own
power, and proceeded on said voyage. That there-
after in the progress of the same voyage, the mer-
chandise which in the libel herein is alleged to have
been damaged, was received and taken on board said
steamship for transportation to Seattle. [449]

That previous to the arrival of said steamship at Seattle, completing said voyage, no repairs were made, during the progress of said voyage. [450]

That going northward on said voyage said steamship carried in her hold, as part of her cargo, several hundred tons of coal in bulk, which was discharged at different places in Alaska, the last of which was not discharged until after the taking on board of that part of the libellant's merchandise which was received at Chilkoot.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 21, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [451]

[Memorandum Decision.]

United States District Court, Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES COMPANY, a
Corporation,

Libellant,

vs.

THE STEAMSHIP "JEANNIE," Her Tackle,
Apparel, Furniture, etc.,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Filed June 25, 1915.

Libellant commenced an action against the steamship "Jeanie," a wooden vessel of about eight hun-

dred tons; and twenty-two years old, twelve to fourteen years of which time she had been plying the Alaskan and north Pacific Coast waters, and chartered in the spring of 1912 by W. F. Swan and W. C. Dawson for trade between Seattle and Alaskan points, for loss sustained to a cargo of salmon shipped from various points in Alaska to the city of Seattle, for damage occasioned to the salmon on account of improper dunnage and unseaworthy condition of the vessel, by reason of which the hold of the vessel was flooded. It appears that in the early part of December, 1912, the "Jeanie" left Seattle with a cargo of five or six hundred tons of coal and some merchandise for southern Alaskan ports. While north bound she was detained for several hours, on December 12th or 13th, in Wrangell Narrows, off the southeastern coast of Alaska, where she was anchored in shallow water and sank into about four feet of mud, but floated again with the return of the tide, and proceeded to Juneau, where she arrived on or about the 15th of December. The coal was to be delivered at Juneau, Gypsum, Sulzer, Sitka and Ketchikan. Owing to bad weather no stop was made at Gypsum or Sulzer. About 150 tons was delivered at Sitka, some at Juneau and some at Ketchikan. After leaving Juneau the vessel proceeded to Chilcoot where a [452] portion of libellant's salmon was loaded. The "Jeanie" then attempted to go to Gypsum, but owing to bad weather was compelled to go on to Sitka without stopping at Gypsum. From Sitka the vessel tried to go to Sulzer but was unable to stop there because of unusual weather, and pro-

ceeded to Ketchikan, where the balance of the coal was unloaded, and from there to Yes Bay and Chomly, where the balance of libellant's salmon was loaded, returning from there to Ketchikan, from which port she proceeded on her homeward voyage, January 3, 1913, and arrived in Seattle, January 8, 1913, after an unusually tempestuous voyage. The "Jeannie" received, on this trip, from libellant's canneries 10,747 cases of canned salmon at Chilkoot, 13,972 cases at Yes Bay, and 4,737 cases at Chomly, aggregating 29,657 cases, for transportation to Seattle. The "Jeannie" had made frequent trips to and from Alaska. No survey or inspection of the vessel was made between the time of her arrival in Seattle on her last preceding voyage and her departure from Seattle on the voyage in question. Her master and pilot as well as the charterers testified that they believed she was in good condition. A preliminary survey of the "Jeannie" was made June 22, 1912, and a thorough survey made July 26, 1912, in dry dock. Certain repairs were recommended and made, and the vessel certified to be in a good seaworthy condition and fit to carry dry and perishable cargo. No further repairs were made until September following, when some caulking was done around the steam winches on the deck, and other minor repairs made. The tarpaulins were insufficient to prevent leakage. Some of the coal was discharged before salmon was taken on. After coal was taken out of the hold, the hold was scrubbed, scraped, rubbed and made as clean as they thought it was necessary. There was no bulkhead between the salmon and the

coal remaining on the vessel when the first salmon was taken on. A loose plank was discovered in the forward part of the ship, in the middle of the hatch in the clear space [453] between the salmon and the coal, that had been lifted up by the force of the water and was lying to one side, which caused the water to wash the bilges and flood the salmon. The spikes in the plank had been driven into the knees or cross-beams of the ship which were not rotten, and the plank was again spiked to position and held. The plank was of soft wood and the only way the witness accounted for the loosening of the plank was that the water "just hammered underneath it until it lifted it up." The space in which the bilge water could accumulate underneath the plank and the outside planking on the bottom of the ship was about nine inches, and the witness thought the water in that space, working from side to side, would have enough force to loosen the plank, although he had never seen it happen to any other ship he was on, and he thought the only way the water got in to damage the cargo was through the seams of the ship opened by the straining of the vessel in the heavy seas. On re-direct examination, he stated that the plank that was loosened was about one and one-half feet from where the salmon was, and that it was apparently the same age, size and construction as the other planks of the ship. Upon arrival at the port of Seattle, it was found that the entire cargo was damaged from coal-dust and water. A special examination and survey of the cargo was made and notice of damage given to claimant, and with the knowledge and approval of

the owners, and in order to reduce the loss to a minimum, libelant caused the salmon to be overhauled and reconditioned.

Two amended libels were filed in this case; the first to conform to the testimony, and the last in the nature of a reply in conformity to Admiralty Rule 51.

**LIBEL FOR DAMAGE TO A CARGO OF
SALMON—LIBELANT'S CLAIM ESTAB-
LISHED.**

C. H. HANFORD, KERR & McCORD, for
Libelant.

BOGLE, GRAVES, MERRITT & BOGLE, for
Claimant. [454]

NETERER, District Judge (after stating the facts):

Recovery in this case, if it is to be had, must be upon the unseaworthy condition of the vessel, improper dunnage, or negligence in caring for the cargo. It is contended by claimant that the ship was seaworthy; and that if it was not actually seaworthy, it was operated with due diligence to make it so, and that it is exempted from liability by the stipulations of the bills of lading; that damage, if any, was due to the extraordinary rough weather, bringing the damage within the excepted perils of the sea; that the damage, if any, caused by coal-dust, was without fault or negligence on the part of the owners; and that if there is any liability, it is not nearly the amount claimed. I think the testimony in this case abundantly establishes the fact that the vessel was not in a seaworthy condition, especially in view of the presumptions of law which obtain in favor of

libelant. The *Patria*, 125 Fed. 425, 132 Fed. 971; *Wright v. Grace & Co.*, 203 Fed. 360. The fact that damage was occasioned by reason of water coming in contact with coal-dust, is conclusive, to my mind, that the proper diligence had not been exercised to place the hold of the ship in the condition that it should have been in to receive the salmon after the coal was taken out, or proper care taken in removing coal after some of the salmon had been loaded. Parties must exercise the diligence which the circumstances demand, and while it would not have been necessary to have taken greater precaution in cleaning the hold of the ship from the coal-dust than the sweeping, brushing and scrubbing which the testimony shows was done, or placing such covering over the salmon as shown, when taking coal out, to make the vessel fit to carry some cargoes, the officers of the ship must, at their peril, when they store a cargo of salmon which is labeled ready for the market, and which must be exposed for sale, and where the contact of water and coal-dust would be destructive of the attractability of the prepared eatables, exercise a greater degree of [455] care than otherwise, and the fact that the complaint was made with relation to the tarpaulins as being inadequate and insufficient and the loosening of the keelson plank underneath the hold, and the fact that water did get into the hold of the ship in the quantities which the evidence shows, are all conclusive, to my mind, that, taking into consideration the character of the cargo, the parties did not exercise that degree of care which the circumstances demanded, and unless they are excused

for some other reason, that liability attaches. I think, it being established that the salmon was in good condition when it was received, the legal presumption would be that any damage which was occasioned was occasioned through the negligence of the officers of the vessel—The Queen, 78 Fed. 156, and the Rappahannock, 184 Fed. 291. Nor is the presumption of unseaworthiness the only presumption arising where goods are shown to have been received by a carrier in good condition and delivered in a damaged condition. Negligence is presumed on the part of the master and crew in caring for the goods which are damaged during the progress of the voyage. In the Queen, *supra*, at pages 165–166, the Court said:

“In the present case, the claimant has introduced testimony to establish the seaworthy condition of the vessel when she set out on her voyage, and this testimony has not been contradicted. Now, if the only presumption of negligence arising out of the damaged condition of the merchandise was that the voyage had been commenced with a vessel in an unseaworthy condition, the court would be compelled to hold that the claimant had sufficiently answered the *prima facie* case made out by the libelants; but this does not appear to be the full scope of the presumption of negligence attributable to the carrier under this aspect of the case. Underlying the contract of implied warranty, on the part of the carrier, to use due care and skill in navigating the vessel and in carrying goods, and

it may be that, through such carelessness or negligence on the part of the carrier during the voyage, goods laden on board the vessel may suffer damage."

As to the seaworthiness of the vessel the claimant is an insurer, and can only escape liability for water damage by reason of perils of the sea, that is "those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against [456] by the ordinary exertions of human skill and prudence." *The Giulia*, 218, Fed. 744. While the evidence shows that the sea upon this voyage was tempestuous even for Alaskan waters, it was not such a condition as to bring it within this exception. As to the cargo, of course the same degree of diligence does not apply. A vessel, to be seaworthy, must be tight, staunch, strong, well furnished, manned and victualed, and in all respects equipped in the usual manner for the merchandise service in such trade. 3 Kent's Commentaries, 205; *The Lillie Hamilton*, 218 Fed. 327. It must be fit and competent to carry the particular cargo which it engages to carry, *The Caledonia*, 157 U. S. 124; *Work v. Leathers*, 97 U. S. 379, and able to resist all ordinary action of the sea in the particular zone or sea which it engages to sail *Dupont de Nemours v. Vance*, 19 How. 162, and as said by Justice Day in *The Silvia*, 171 U. S. 464:

"The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport."

And again, in *The Southwark*, 191 U. S. 9:

“As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that the vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect.”

It could not be reasonably contended that a vessel engaging to sail the Alaskan waters and carrying canned salmon could do so in a vessel which was not able to ride the seas in these particular waters during the particular season of the year in which the voyage was made, unless within the excepted sea perils, which is not shown; nor that canned salmon, as was this, to be sold to some extent because of the attractive appearance it would make upon exposition, could be stored in a hold of a ship in which coal had been carried, without taking every precaution to remove the particles of coal dust that were lodged there, and likewise to fortify against the waters of the sea and coal dust coming in [457] contact with the cargo. *The Lizzie W. Virden*, 8 Fed. 18, and 11 Fed. 903; *The Hudson*, 122 Fed. 96; *The Florida*, 69 Fed. 169; *The Mississippi*, 113 Fed. 985, and 120 Fed. 1020. The only evidence to rebut the presumptions is merely the statement of the master and some members of the crew and one of the charterers in which they say that the vessel was in apparently good condition and that precautions had been taken to take away the coal dust which they knew was lodged there. In *Corsar v. Spreckles*, 141 Fed. 261,

at page 269, Circuit Judge Ross said:

“Indeed, unless otherwise expressly stipulated, an implied warranty of unseaworthiness of the ship at the time of commencing the voyage accompanies every contract of affreightment. *The Caledonia*, 157 U. S. 130. And this includes, not only a ship seaworthy in hull and equipment, which conditions it is conceded the *Musselcrag* met, but also seaworthy in respect to the stowage of the cargo, *The Edwin I. Morrison*, 153 U. S. 211 (and other cases cited).”

In that case a ship was held liable for damage to a cargo of cement, where the ship, though not unseaworthy as to hull and equipment, was held unseaworthy as to stowage of cargo. The tarpaulins or hatch covers were not sufficient to prevent leakage, *The C. W. Elphicks*, 122 Fed. 439, in view of the voyage and the season of the year; nor is the ship released by reason of the stipulations in the bills of lading. The testimony, I think, is conclusive, that these bills of lading were not delivered to any of the officers of the libelant company. If they were issued, they were delivered to the watchmen at libelant's canneries, persons who were not connected with the libelant company in any official relation, and who were not in a capacity to negotiate with relation to the transportation. The record shows that there was an oral understanding between the parties with relation to the shipment of this cargo, and while no terms appear to have been detailed or specially understood, liability could not be limited except by mutual consent, and of the bills

of lading were not issued to any authoritative persons and there was no understanding with relation to them, then the libelant could not be bound by their stipulations. Mr. Justice Grey, in *The Caledonia*, 43 Fed. 681, where there was a preliminary agreement for transportation service and [458] subsequently a bill of lading containing exception clauses was signed and accepted by the libelant, and there was a loss in the market value of the cargo during the delay in reaching destination, said:

“When the parties have made such a contract, the ship owner cannot, without the shipper’s consent, vary its terms by inserting new provisions in a bill of lading. * * *

In the case at bar, the unseaworthiness of the vessel consisted in the unfitness of her shaft when she left port. * * * The exception of ‘steam boilers and machinery, or defects therein,’ inserted in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening after the beginning of the voyage, must, by elementary rules of construction, and according to the great weight of authority, be held to be equally limited in its scope, and not to affect the warranty of seaworthiness at the time of leaving port upon her voyage.

* * * A common carrier, receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the same place afterward, and when their market value is less, is responsible to the owner of the goods

for such differences in value. * * * The same general rule has been often recognized as applying to carriers by sea in this circuit as well as to the second circuit."

And the Supreme Court of the United States, in 157 U. S. 124, in affirmance, said:

"In our opinion the ship owner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

In the *Pacific Coast Co. v. Yukon Independent Transportation Co.* (this circuit) 155 Fed. 29, the Court said, at page 37:

"But if, indeed, the parol testimony so admitted in evidence did have the effect to modify some of the provisions of the bills of lading, it was, under the circumstances disclosed in this case, admissible for that purpose, for the bills of lading were issued after the goods had been delivered on board the 'Senator,' and after they had passed from the control of the shipper, and the vessel was about to go on her way. The burden was then upon the carrier to show that its agents directed attention to the terms of the bills of lading and that the shipper assented to them. *The Arctic Bird* (D. C.) 109 Fed. 167; *Bostwick v. B. & O. R. Co.*, 45 N. Y. 712; *Strohm*

v. Detroit & M. Ry. Co., 21 Wis. 662; Mo. Pac. Ry. Co. v. Beeson, 30 Kan. 298, 2 Pac. 496; Mich. Cen. R. R. Co. v. Boyd, 91 Ill. 268."

In this case, not only were the bills of lading not delivered to, and their stipulations called to the attention of, any officer or authorized agent of libelant, but they were delivered to watchmen [459] at the canneries, utter strangers to any responsible or authoritative head of libelant company.

Respondent contends that it is exempted from liability because of the Harter Act, and that there is no evidence that the master and crew of the vessel did not use due diligence to make the vessel seaworthy.

Under Section 1 of the Harter Act (27 Stat. at L. 445), it is unlawful for any vessel transporting merchandise to insert in any bill of lading or shipping document, any clause relieving it from liability "for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all merchandise or property committed to its * * * charge." By the terms of Section 2 of this act the owners or agents cannot insert in any bill of lading or shipping document, any clause lessening, weakening or avoiding the obligations of the owners, *to exercise due diligence* to properly equip, man, provision and outfit the vessel. Section 3 of this act exempts vessels from liability for loss or damage resulting from faults or errors in navigation or in the management of the vessel, or from losses arising from dangers of the sea or other navigable waters, acts of

God, or public enemies, or inherent defect in the thing carried, etc., provided the owner *shall have exercised due diligence* to make the vessel in all respects seaworthy and properly manned, equipped, and supplied. This act, from the conclusion we have arrived at from the testimony, cannot avail anything to the respondent. The Supreme Court of the United States in the *Carib Prince*, 170, U. S. 655, at page 660, says:

“Now, it is patent that the foregoing provisions (sec. 2, Harter Act) deal not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by contract, when the particular conditions exacted by the statute obtain. Because the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself, he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to [460] the duty of using due *negligence*. To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist. The fallacy of the construction relied on consists in assuming that because the statute has forbidden

the ship owner from contracting against the duty to furnish a seaworthy ship unless he has been diligent, that thereby the statute has declared that without contract no obligation to furnish a seaworthy ship obtains in the event due diligence has been used. And the same fallacy is involved in the contention that this construction is supported by the third section of the act."

It follows that the bills of lading being inoperative, respondent must not only show that due diligence was exercised in furnishing a seaworthy vessel, but that it was in fact seaworthy. It is contended by the respondent that the coal-dust damage, if any, was occasioned by an error in management or navigation, and within the protection of the third section of the Harter Act, and in support of this contention, cites *Corsar v. Spreckles*, *supra*. An examination of the case, I do not think, supports the contention. Judge Ross, pages 262, 63, says:

"It will thus be seen that by virtue of the Harter Act the ship is still held, as theretofore, responsible for loss or damage arising from negligence, fault, or failure in the proper custody, care or delivery of the cargo, and at the same time is exonerated from damage or loss resulting from faults or errors in navigation or in the management of the vessel, where due diligence has been exercised to properly man, equip, and supply it, and to make it in all respects seaworthy. It will not do to so construe these provisions as to make them nullify each other. On

the contrary, they must be so read as to give effect to each, if possible. Undoubtedly a fault or error in the navigation or management of a vessel carrying a cargo, may, and often does, result in injury to the 'custody, care and delivery' of the cargo. But if the owner of the vessel has performed his duty by making the vessel in all respects seaworthy for the voyage it undertakes, it is plain that neither he nor the vessel can be held responsible from any merely incidental damage resulting to the cargo from fault or error in its subsequent navigation or management, if section 3 of the act is to be given any force. * * * In the case in hand, the record shows that for about seven weeks the ship in question struggled with wind and wave in an effort to round Cape Horn. * * * The question confronting him (the master) was primarily and essentially one of navigation—how best, in view of the trying circumstances in which he was placed, to deal with the elements, and get his ship, with her crew and cargo, to the place of destination. That his action in determining that question was primarily and essentially one of navigation, does not, in our opinion, admit of the slightest doubt; and, being such, neither the ship nor her owner is responsible for [461] incidental damage sustained by the cargo, because of the provision of the third section of the act of Congress above referred to."

In that case the question was one of navigation

and clearly within the third section of the act. In this case the damage was occasioned by the water and coal-dust, by reason of the ship's officers' failure to properly prepare the hold and in handling or caring for the cargo, and not because of any error in management or navigation. In *The Jean Bart*, 197 Fed. 1002, at page 1105, the Court said:

"The question, therefore, is whether the failure to properly use the ventilating equipment is a fault of error in navigation or in the management of the ship,' under the third section; or whether it is 'negligence, fault or failure in proper * * * care of * * * merchandise or property committed' to the charge of the claimant. It sometimes happens that the duty of the ship's officers may relate both to the management of the ship and to the care of the cargo, and the rule has theretofore become established that the proper classification in law of such a duty depends upon the purpose to which it primarily relates. * * * I am of the opinion that here the failure of the officers primarily related to the care of the cargo, and only incidentally, if at all, to navigation or the management of the ship."

The master and crew, I do not think, used due care in protecting the cargo from the coal-dust and water, and respondent cannot find refuge within the provisions of Section 3 of the Harter Act..

Finally, it is contended that should a liability exist against the ship for any damage to the cargo that the full charge for reconditioning the salmon

should not be allowed, and that no damage should be allowed for the difference in the market value of the salmon as claimed, for the reason that the libelant at all times had sufficient salmon in stock to supply all of the orders received during the delay in the delivery, and quotes the following from Moore on Carriers, 2d ed., p. 623:

“Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable,”

And on page 624:

“Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages.” [462]

No issue can be taken to that as the basic principle underlying the law of damages, generally speaking. The testimony discloses that the charge made for reconditioning the salmon was a reasonable and ordinary charge; that the work done was necessary to place the salmon in as good condition as that in which it was received by the steamship “Jeanie.” The claim was paid by the libelant. It is contended by respondent that the so-called “market price” of salmon was not the price it could be sold for, but an arbitrary price at which the owners and dealers of salmon were willing to sell, and that the price was fixed by the Alaska Packers Association, the largest producer of canned salmon on the coast, arbitrarily, irrespective of supply and demand, and this quotation adopted by the other packers, and the subsequent reduction of price was fixed in the same arbitrary manner, and that Kelley-Clarke Co. handled

practically all of the salmon sold in the Seattle market, and all of libelant's pack for that year, and that when it received orders for salmon it apportioned the orders among its various members, taking into consideration kind, quantity, brands, etc., and that during this period of delay there were few orders for salmon at prices they were willing to accept, and that they had quantities of salmon of all brands belonging to libelant with which orders could be filled. This contention, I do not think, can be sustained by the evidence. There is no testimony upon which the Court would be justified in basing a conclusion of market value other than that contended for by the libelant. While there is some evidence upon which to base argument that the market price was merely an arbitrary price, bearing no relation to supply and demand, I think that a fair consideration of all of the testimony, bearing in mind the relation to the issue, does not justify the Court in adopting this as a conclusion. The market value is the price at which a commodity can be purchased in the open market, and there is no testimony of any other market value than that contended for. The measure of damages is stated [463] by Moore on Carriers, at page 410, as follows:

“In an action against a carrier of goods for failure to deliver the same within a reasonable time, the measure of damages is the difference in value of the merchandise at the time and place it ought to have been delivered in the usual course of transportation and at the time of its actual delivery or tender, whether the differ-

ence in value was occasioned by injury to the goods or was due to a decline in the market value, with interest added, and freight charges, if any unpaid, deducted."

It was the duty of the parties to this litigation, upon discovery of damage, to lessen, if possible, the damage, and having chosen to recondition the salmon and thus diminish the claim, libelant is entitled to recover the cost and charges of reconditioning as well as the depreciation of the market price of the salmon during the reconditioning period, the delay in marketing being directly caused by the Carrier. The law presumes a loss equal to the depreciation in market value during the period of detention, and from the evidence, taking the market price as disclosed by the record as a basis which must be adopted by the Court, we find a loss in depreciation of \$7,935.00. The cost or value of reconditioning is \$4,283.06. I think that interest should be allowed at the legal rate upon the moneys expended by the libelant in reconditioning the salmon. Judge Deady, in *The Nith*, 36 Fed. 95 (Dist. Court, Ore.), said:

"Some of the authorities say that the allowance of interest should depend on circumstances. But I do not see why it should be disallowed in any case where the shipper is entitled to damages for non-delivery. From the date of such non-delivery the owner, by the fault of the carrier, is deprived of the use of the money or capital invested in the goods, and should have redress by being allowed legal interest thereon."

The decision of the District Court in that case was

affirmed in 36 Fed. 383. From this expression, approved by the Circuit Court of this circuit, having found that libelant is entitled to recover, I think that it must also recover interest at the legal rate covering the period of detention.

The shipper having a right to resort to the vessel for damages growing out of failure to fulfill the contract for the [464] carrying of merchandise, by the maritime law, *The Belfast*, 7 Wall. 642, and *Dupont de Nemours v. supra*, a decree may be presented in accordance with the conclusions above announced.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [465]

*In the United States District Court for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANIE," Her Tackle, Apparel,
Furniture, etc.,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Decree.

This cause having been commenced by the filing

in the office of the Clerk of this Court of a libel against the steamship "Jeanie," her tackle, apparel, furniture, etc., and a Writ of Monition and Attachment for the seizure of said vessel, her tackle, apparel, furniture, etc., having been issued and delivered to the United States Marshal for the District of Washington, which he returned into court with a bond for the release of said vessel, executed by the Alaska Coast Company, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, in the sum of Fifteen Thousand Dollars (\$15,000), conditioned that the said Alaska Coast Company shall abide by and perform the decree of this Court in such cause; and the said Alaska Coast Company, a corporation, having filed its claim as owner of said vessel, her tackle, apparel, furniture, etc., and answered said libel, and the cause having been referred [466] to A. C. Bowman, United States Commissioner, to take and report the evidence, and amended pleadings having been filed by and on behalf of both said libelant and said claimant, and said Commissioner having returned into Court a transcript of the testimony taken, together with the exhibits introduced in evidence, and the cause having proceeded to a final hearing on the pleadings, evidence and arguments by the several proctors for the parties and the Court having heretofore filed its opinion in writing and being now sufficiently advised in the premises, it is

ORDERED, ADJUDGED and DECREED by the Court: That the Alaska Pacific Fisheries, a cor-

poration, the libelant, do have and recover of and from the Alaska Coast Company, a corporation, the claimant, and its surety, the said United States Fidelity & Guaranty Company, a corporation, the sum of \$4,283.06, with interest thereon at the rate of 6% per annum from the 8th day of April, 1913, to this date, amounting to the further sum of \$578.20; and the further sum of \$7,935.00, without interest prior to this date, amounting to the total sum of \$12,796.26, with interest on said total sum at the rate of 6% per annum from this date, and the libelant's costs and disbursements herein taxed and allowed at the sum of \$ ———, and that execution issue therefor.

Done in open court this 12th day of July, 1915.

JEREMIAH NETERER,

Judge. [467]

Copy of within Proposed Decree received this 2d day of July, 1915.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant.

[Indorsed]: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 12, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [468]

*In the United States District Court for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Notice of Appeal.

To Alaska Pacific Fisheries, a Corporation, Libelant
Herein, and to Messrs. Kerr & McCord, and
C. H. Hanford, Esquire, Proctors for Libelant,
and to Frank L. Crosby, Clerk of Said Court:

YOU, AND EACH OF YOU, WILL PLEASE
TAKE NOTICE that the Alaska Coast Company, a
corporation, claimant herein, hereby appeals from
the final decree made and entered herein on the 12th
day of July, 1915, in favor of said libelant and
against said claimant, and the stipulator, for the re-
lease of said steamship "Jeanie," etc., for the sum
of Twelve Thousand Seven Hundred Ninety-six Dol-
lars and Twenty-six Cents (\$12,796.26), with inter-
est thereon at the rate of six per cent (6%) per an-
num from the date of said decree, together with
libelant's costs and disbursements taxed at [469]
Two Hundred and Four and 90/100 Dollars
(\$204.90), and from each and every part of said de-

cree, to the next United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Seattle, Washington, this 30th day of July, 1915.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant.

Due service of the foregoing Notice of Appeal, after the filing of the same in the office of the clerk of the above-entitled court, is hereby admitted by proctors for libelant this 30th day of July, 1915.

KERR & McCORD,

C. H. HANFORD,

Proctors for Libelant.

[Indorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [470]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Order Fixing Supersedeas Bond on Appeal.

The ALASKA COAST COMPANY, a corporation, claimant herein, having appealed from the final decree herein, to the next United States Circuit Court of Appeals for the Ninth Circuit, and desiring to stay the execution of the said decree pending such appeal; and it appearing that said claimant has heretofore given a bond herein, in the sum of Fifteen Thousand Dollars (\$15,000), for the release of said steamship "Jeanie"; and the Court being of the opinion that a further bond in the sum of One Thousand Dollars (\$1,000) is sufficient upon such appeal, as a cost bond and to operate as a supersedeas in said cause, and said libelant consenting to such amount being fixed for such bond on appeal.

NOW, IT IS HEREBY ORDERED AND DECREED that the appeal bond to be given on such appeal be, and the same is, hereby fixed at the sum of One Thousand Dollars (\$1,000), which [471] sum shall operate as a supersedeas in said cause.

Dated at Seattle, Washington, this 30th day of July, 1915.

JEREMIAH NETERER,
United States District Judge.

We hereby consent to the making of the foregoing order, and acknowledged receipt of a copy thereof.

Dated at Seattle, Washington, this 30th day of July, 1915.

KERR & McCORD,
C. H. HANFORD,
Proctors for Libelant.

[Indorsed]: Order Fixing Supersedeas Bond on Appeal. Filed in the District Court, Western Dist. of Washington, Northern Division. July 31, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [472]

*In the United States District Court for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Assignment of Errors.

Comes now the above-named Alaska Coast Company, a corporation, claimant in the above-entitled cause, and says that in the record and proceedings in said cause, and in the decree made and entered therein, on the 12th day of July, 1915, there are manifest errors in the following particulars:

I.

That the said Court erred in holding, finding and decreeing that the said steamship "Jeanie" was unseaworthy upon the voyage in question in said cause.

II.

That the said Court erred in holding, finding and decreeing that there was an oral understanding or

agreement for the transportation of the cargo involved in said cause upon the said steamship upon the said voyage. [473]

III.

That the said Court erred in holding, finding and decreeing that no bills of lading for the transportation of said cargo upon said vessel on the said voyage were delivered to any officer or authorized agent of said libellant; and that the watchmen to whom such bills of lading were delivered were utter strangers to any responsible or authoritative head of said libellant company.

IV.

That the said Court erred in holding, finding and decreeing that the bills of lading, issued and delivered for the transportation of said cargo upon said vessel on said voyage, were not binding upon the parties hereto, but were inoperative, and that said vessel and claimant herein were not released from liability for all or any part of the damage to said cargo upon said vessel on said voyage by reason of the failure of said libellant to comply with the terms and conditions of said bills of lading relative to filing claim and commencing suit for such damage.

V.

That the said Court erred in holding, finding and decreeing that said vessel, and claimant herein, were not exempt from liability for all or any part of the damage to said cargo upon said vessel on said voyage, under the terms of the Act of Congress commonly known as the Harter Act.

VI.

That the said Court erred in holding, finding and decreeing that the said vessel, and claimant herein, are liable to libelant for all or any part of the damage to said cargo upon said vessel on said voyage. [474]

VII.

That the said Court erred in awarding and decreeing to libelant herein as and for its damage, on account of injury or damage to said cargo upon said vessel on said voyage, the sum of Four Thousand Two Hundred Eighty-three and 6/100 Dollars (\$4,283.06), or any part thereof as the cost of reconditioning said cargo, in that said award was not warranted by the evidence herein and was and is excessive and erroneous.

VIII.

That the said Court erred in awarding and decreeing to libelant herein, as and for its damage on account of injury or damage to said cargo upon said vessel on said voyage, the sum of Seven Thousand Nine Hundred Thirty-five Dollars (\$7,935), or any part thereof, as the amount of depreciation of the market price of said cargo during the period of reconditioning such cargo, in that said award was not warranted by the evidence herein, and the law applicable thereto.

IX.

That the said Court erred in holding, finding and decreeing that libelant herein is entitled to recover any amount whatever herein against said vessel, or claimant or its stipulator herein, on account of de-

preciation in market price of said cargo; and in awarding and decreeing to libelant any sum whatever as and for such depreciation in market price.

X.

That the said Court erred in entering judgment herein in favor of said libelant in any amount whatsoever. [475]

XI.

That the said Court erred in refusing to enter judgment herein in favor of claimant, and dismissing said libel, with costs to appellant.

WHEREFORE, claimant herein prays that the said decree may be reversed, modified and corrected in the particulars herein set forth, and such decree entered therein as ought to have been entered by the said District Court.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant.

Service of the within assignment of errors, and receipt of a copy thereof, admitted this — day of July, 1915.

KERR & McCORD,

C. H. HANFORD,

Proctors for Libelant and Appellee.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 31, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [476]

*In the United States District Court for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Citation on Appeal [Copy].

United States of America,—ss.

The President of the United States, to Alaska Pacific Fisheries, a Corporation, Libelant Herein, and to Messrs. Kerr & McCord, and C. H. Hanford, Esquire, Its Proctors Herein, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED TO BE AND APPEAR before the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, within thirty (30) days from the date hereof, pursuant to an appeal to the said Court duly filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein the said [477] Alaska Coast Company, a corporation, is appellant, and you, the said Alaska Pacific Fisheries, are appellee, then and there to show cause, if any there be, why the decree of the United States District Court for the Western

District of Washington, Northern Division, in the above-entitled cause, dated July 12, 1915, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 31st day of July, 1915.

[Seal] JEREMIAH NETERER,
Judge of the United States District Court for the
Western District of Washington.

Due service of the within citation, after the filing of the same in the office of the Clerk of the above-entitled Court, is hereby admitted this 31st day of July, 1915.

KERR & McCORD,
C. H. HANFORD,
Proctors for Libellant and Appellee.

[Indorsed]: No. 2570. Original. In the District Court of the United States, Western District of Washington, Northern Division. Alaska Pacific Fisheries, a Corporation, Libellant, vs. The Steamship "Jeanie," Her Tackle, Apparel, Furniture, etc., Respondent. Alaska Coast Company, a Corporation, Claimant. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 31, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. Bogle, Graves, Merritt & Bogle, 609-616 Central Building, Seattle, Washington, Proctors for Claimant. [478]

*In the United States District Court, for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANNIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That we, Alaska Coast Company, a Corporation, as
principal, and United States Fidelity & Guaranty
Company, a corporation, duly authorized to do busi-
ness in the State of Washington and act as surety
therein, as surety, are held and firmly bound unto
Alaska Pacific Fisheries, a corporation, libelant
above named, in the sum of One Thousand Dollars
(\$1,000), lawful money of the United States, to be
paid to said Alaska Pacific Fisheries, for which pay-
ment, well and truly to be made, we bind ourselves,
our and each of our successors and assigns, jointly
and severally, firmly by these presents.

Sealed with our seals and dated at Seattle, this 2d
day of August, 1915.

WHEREAS, the said Alaska Coast Company, a
corporation, principal herein, has lately appealed to
the next United [479] States Circuit Court of

Appeals, for the Ninth Circuit, from the final decree made and entered in the above-entitled Court on the 12th day of July, 1915, and having filed its assignment of errors in the office of the Clerk of said Court, and a citation was duly issued in said cause on such appeal; and said Court having fixed the amount of the bond on such appeal in order to stay the execution of such decree.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the above-named Alaska Coast Company, appellant in said cause, and principal herein, shall prosecute said appeal to effect and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

ALASKA COAST CO.

By R. J. RINGWOOD,

Its Manager.

UNITED STATES FIDELITY AND
GUARANTY COMPANY.

[Seal]

By JOHN C. McCOLLISTER,

Attorney in Fact.

Sealed and delivered, and taken and acknowledged this 2d day of August, 1915, before me.

[Seal]

C. F. RIDDELL,

Notary Public in and for the State of Washington,
Residing at Seattle. [480]

The foregoing bond approved as to form, amount and sufficiency of surety, and receipt of copy acknowledged, and notice of filing waived, this 2d day of August, 1915.

KERR & McCORD,
C. H. HANFORD,

Proctors for Libelant and Appellee.

The foregoing bond and the sufficiency of the surety thereon is on this 6th day of August, 1915, approved as an appeal and supersedeas bond by the undersigned.

JEREMIAH NETERER,
United States District Judge.

[Indorsed]: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 6, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [481]

*In the United States District Court, for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANNIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,
ALASKA COAST COMPANY, a Corporation,
Claimant.

**Stipulation for Order Extending Time to File
Apostles on Appeal.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective proctors herein, that an order may be made and entered herein, extending the time within which the apostles on appeal herein shall be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California, to and including Saturday, the 4th day of September, 1915, and that said cause shall be docketed for hearing upon the appeal therein at the next term of said Court of Appeals, to be held at San Francisco, California, commencing on the first Monday in October, 1915.

Dated at Seattle, Wash., this 30th day of August, 1915.

C. H. HANFORD and
KERR & McCORD,

Proctors for Libelant and Appellee.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Claimant and Appellant. [482]

[Indorsed]: Stipulation for Order Extending Time to File Apostles on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 30, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [483]

*In the United States District Court, for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANNIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Order Extending Time to File Apostles on Appeal.

In pursuance of a stipulation of the parties hereto,
and good cause appearing therefor.

It is ORDERED that the Alaska Coast Company,
appellant in the above cause, may have to and in-
cluding the 4th day of September, 1915, within which
to procure to be filed in the United States Circuit
Court of Appeals for the Ninth Circuit, at San Fran-
cisco, California, the Apostles on Appeal in the
above-entitled cause, certified by the Clerk of the
above-named court.

Done in open court this 30th day of August, 1915.

JEREMIAH NETERER,

Judge.

O. K.—

C. H. HANFORD and
KERR & McCORD,

Proctors for Libelant and Appellee.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Claimant and Appellant. [484]

[Indorsed]: Order Extending Time to File Apostles on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 30, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [485]

*In the United States District Court, for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libellant,

vs.

The Steamship "JEANNIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Praeceptum for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

You will please prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, the Apostles on Appeal in the above-entitled cause, pursuant to the rules of said Circuit Court of Appeals; and please include in such Apostles the following:

1. A caption exhibiting the proper style of the Court and the title of the cause.
2. A statement showing the time of the commencement of the suit (September 29, 1913).
3. The names of the parties.

4. The several dates when the respective pleadings were filed. [486]
5. Statement showing whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and an account of the proceedings thereunder.
6. The time when the trial was had.
7. The name of the Judge hearing the same.
8. Statement that no question was referred to a Commissioner.
9. The date of the entry of final decree (July 12, 1915).
10. The date when notice of appeal was filed (July 30, 1915).
11. All the pleadings, with the exhibits annexed thereto, including in such pleadings the following:
 - (a) Libel, filed September 29, 1913.
 - (b) Answer to Libel, filed October 13, 1913.
 - (c) Amended Libel, filed March 21, 1914.
 - (d) Amended Answer, filed March 25, 1914.
 - (e) Second Amended Libel, filed February 17, 1915.
 - (f) Stipulation, filed March 30, 1915.
12. All the testimony and other proofs adduced in the cause, including the following:
 - (a) Testimony taken before and reported by A. C. Bowman, U. S. Commissioner.
 - (b) All exhibits filed, viz.—Libelant's Exhibits "A" and "B" and Respondent's Exhibits 1, 2, 3, 4, 5, 6 and 7.

- (c) Deposition of Thomas Cochrane, with stipulation for taking same.
 - (d) Deposition of T. Banbury, with stipulation for taking same.
 - (e) Stipulation as to facts, filed March 21, 1914.
- 13. Memorandum decision, filed June 25, 1915.
[487]
 - 14. Final Decree, filed July 12, 1915.
 - 15. Notice of Appeal, with admission of service, filed July 30, 1915.
 - 16. Order Fixing Amount of Stay Bond, with approval thereof, filed July 31, 1915.
 - 17. Assignment of Errors, with admission of service, filed July 31, 1915.
 - 18. Original Citation on Appeal, with admission of service, filed July 31, 1915.
 - 19. Copy of Citation.
 - 20. Bond on Appeal, with approval thereof, filed August 6, 1915.
 - 21. This praecipe, filed August 3, 1915.

Dated this 30th day of August, 1915.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Claimant and Appellant.

[Indorsed]: Praecipe for Apostles on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.
[488]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

S. S. "JEANIE," Her Tackle, Apparel, Furniture,
etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

**Certificate of Clerk U. S. District Court to Apostles,
etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 488 pages, numbered from 1 to 488, inclusive, to be a full, true and correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the

United States for the Western District of Washington. [489]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Proctors for Claimant and Appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.)	
for making record, certificate	
or return, 1173 folios at 15c..	\$175.95
Certificate of Clerk to transcript of	
record, 4 folios at 15c.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to Original Ex-	
hibits 3 folios at 15c,.....	.45
Seal to said Certificate.....	.20

Total—\$177.40

I hereby certify that the above cost for preparing and certifying record amounting to \$177.40 has been paid to me by Messrs. Bogle, Graves, Merritt & Bogle, Proctors for Claimant and Appellant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 1st day of September, 1915.

[Seal]

FRANK L. CROSBY,
Clerk United States District Court. [490]

*In the United States District Court for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2570.

ALASKA PACIFIC FISHERIES, a Corporation,
Libelant,

vs.

The Steamship "JEANNIE," Her Tackle, Apparel,
Furniture, etc.,

Respondent,

ALASKA COAST COMPANY, a Corporation,
Claimant.

Citation on Appeal (Original).

United States of America,—ss.

The President of the United States, to Alaska
Pacific Fisheries, a Corporation, Libelant
herein, and to Messrs. Kerr & McCord, and C. H.
Hanford, Esquire, Its Proctors Herein, Greet-
ing:

YOU ARE HEREBY CITED AND ADMON-
ISHED TO BE AND APPEAR before the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, at the City of San Francisco, California, within
thirty (30) days from the date hereof, pursuant to
an appeal to the said Court duly filed in the office of
the Clerk of the United States District Court for the
Western District of Washington, Northern Division,
wherein the said [491] Alaska Coast Company, a
corporation, is appellant, and you, the said Alaska
Pacific Fisheries, are appellee, then and there to
show cause, if any there be, why the decree of the

United States District Court for the Western District of Washington, Northern Division, in the above-entitled cause, dated July 12, 1915, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 31st day of July, 1915.

[Seal] JEREMIAH NETERER,
Judge of the United States District Court for the
Western District of Washington.

Due service of the within citation, after the filing of the same in the office of the Clerk of the above-entitled Court, is hereby admitted this 31st day of July, 1915.

KERR & McCORD,
C. H. HANFORD,

Proctors for Libelant and Appellee. [492]

[Endorsed]: No. 2570. (Original.) In the District Court of the United States, Western District of Washington, Northern Division. Alaska Pacific Fisheries, a Corporation, Libelant, vs. The Steamship "Jeannie," Her Tackle, Apparel, Furniture, etc., Respondent, Alaska Coast Company, a Corporation, Claimant. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jul. 31, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

[Endorsed]: No. 2647. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Coast Company, a Corporation, Claimant of the Steamship "Jeannie," Her Tackle, Apparel, Furniture, etc., Appellant, vs. Alaska Pacific Fisheries, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed September 4, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY,
a corporation,

Appellant,

vs.

ALASKA PACIFIC FISH-
ERIES, a corporation,

Appellee.

No. 2647.

*Upon Appeal from the United States District Court
for the Western District of Washing-
ton, Northern Division.*

BRIEF OF APPELLANT

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellant.

Seattle, Washington.

Filed

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY,
a corporation,

Appellant,

vs.

ALASKA PACIFIC FISH-
ERIES, a corporation,

Appellee.

No. 2647.

*Upon Appeal from the United States District Court
for the Western District of Washing-
ton, Northern Division.*

BRIEF OF APPELLANT

W. H. BOGLE,
C. B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellant.

Seattle, Washington.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY,
a corporation,

Appellant,

vs.

ALASKA PACIFIC FISH-
ERIES, a corporation,

Appellee.

No. 2647.

*Upon Appeal from the United States District Court
for the Western District of Washing-
ton, Northern Division.*

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This is a suit *in rem*, against the Steamship "Jeanie," to recover for alleged damage to a shipment thereon of 29,657 cases of canned salmon on a voyage from points in Alaska to Seattle in December, 1912, and January, 1913.

The action was commenced by appellee by the filing of a libel on September 29, 1913, and appel-

lant claimed and released the vessel as owner. The pleadings to be considered are the Libel, a First Amended Libel, a Second Amended Libel, and an Amended Answer.

Each of these libels contained many allegations, denied by the amended answer, which appellee offered no evidence to sustain, and which are immaterial on this appeal, except as we shall refer to some of them in our discussion of the errors relied upon, as having a bearing upon the questions there raised. The allegations of the libels which were tried and upon which the court based its decision, were unseaworthiness of the vessel to carry this cargo, because of uncleanness from coal dust, and insufficient protection of the cargo against the seas encountered. These allegations were denied in the amended answer, as were also the allegations in the libels as to the damages to the cargo claimed by appellee. In its amended answer appellant pleaded, as an affirmative defense, the issuance of bills of lading for the cargo, and failure of appellee to comply with the terms of such bills of lading in making claim for its alleged damage and in bringing suit therefor. By the second amended libel, which contained matter in the nature of a reply, this affirmative defense was denied and an alleged

waiver of the conditions of the bills of lading pleaded.

Evidence was taken before a Commissioner and reported to the court, and two depositions also taken. The court, to which the case was submitted on these pleadings, and the evidence taken, found the vessel was unseaworthy in the two particulars above mentioned, held the vessel liable, and rendered judgment on July 12, 1915, in favor of appellee and against appellant and the surety upon its release bond, for the sum of \$12,796.26 damages and interest, and \$204.90 costs, from which judgment this appeal is taken.

It will be necessary to refer in detail to much of the testimony, in our argument on the errors relied upon here, so we will not attempt to make a statement of this testimony at this time. However, there is no dispute as to many of the facts in the case.

In the year 1912, appellee owned and operated salmon canneries at Chilkoot, Yes Bay and Cholmley, in Southeastern Alaska, and owned the canned salmon referred to above. Prior to the shipment of this salmon on the "Jeanie," the officers of appellee had left these canneries in the sole charge of a

watchman at each, and it had at each cannery a large amount of canned salmon in cases, which it intended to ship to Seattle.

The "Jeanie" was a wooden, steam vessel of about eight hundred tons burden, about twenty-two years old, the last twelve or fourteen years of which time she had run between Seattle and Alaska ports. On the voyage in question the vessel was under charter to W. T. Swan, acting manager for charterers, for trade between Seattle and Alaska points. The vessel left Seattle in December, 1912, on her northbound voyage, with cargo, including coal in bulk. A portion of this coal was discharged at Juneau, and afterwards about 10,747 cases of this salmon taken aboard at the Chilkoot cannery.

After passing Chilkoot, the vessel attempted to pass to the westward, partly through the open ocean, but met such rough weather she could not make headway and turned back. After some further attempts to go to westward, this part of the voyage was abandoned on account of the bad weather. A portion of the remaining coal cargo was unloaded at Sitka, and the balance at Ketchikan later.

After unloading all of the balance of the coal at Ketchikan, the vessel proceeded to Yes Bay

cannery, where it took aboard about 13,972 cases of canned salmon; it next went to Chholmley cannery, where it loaded the balance of the salmon in question, about 4,737 cases. The vessel then proceeded to Seattle, encountering much severe weather on the way.

On arrival of the vessel at Seattle on January 8, 1913, it was found that some of the salmon cases and the cans therein were damaged by water and coal dust. While the cargo was being unloaded, about 2,000 cases, showing damage, were set aside, and afterwards some of the other cases were found more or less damaged. The entire cargo was overhauled by Mr. Horner. No damage was done to any of the salmon in the cans, but some or all of the cans in 4,088 of the cases, out of the entire shipment of 29,657 cases, were reconditioned, some being merely wiped off and relacquered, and some cleaned, relacquered and relabeled. Many new cases or parts of cases were furnished, and the whole cargo, so far as was necessary, was put in first-class, marketable condition, as good, or better, than when it was shipped. This work was not completed until March 19, 1913.

This suit was brought to recover the sum of \$4,283.06, which amount appellee alleged it was com-

pelled to pay Mr. Horner for this work upon the cargo; also to recover certain other items of alleged damage, which appellee claimed it sustained on account of the damaged condition of the cargo. In the first and second amended libels some of these other items of damage were either changed or abandoned, and new items included, particular reference to which will be made in our argument.

The trial court allowed as damages, the sum of \$4,283.06 as the cost of overhauling and reconditioning the cargo, and \$7,935.00 as the depreciation in the market price of the salmon during the reconditioning period. Judgment for these amounts, with interest also allowed by the court, and costs, was entered against appellant and its surety.

The questions involved in this statement of the case, and presented here by the assignment of errors, together with the manner in which those questions are raised upon the record, are as follows:

I.

Appellant will claim that there is not sufficient evidence in the case to sustain a finding that the "Jeanie" was unseaworthy upon this voyage, either as to cleanliness or otherwise; but that the evidence shows that everything required by law and good

seamanship, as well as due and proper regard for the transportation of this cargo of salmon, was done to clean the vessel of coal dust and protect the cargo therefrom. It will also claim that the evidence shows that the vessel was seaworthy, in the matter of protection of the cargo from the weather which might reasonably have been expected upon this voyage, and in all other respects; and that all water damage to the cargo was caused by a peril of the sea, for which the vessel was not liable.

Appellant's Assignment of Errors Nos. I, V, VI, X and XI will be discussed under this heading.

II.

Appellant will claim that bills of lading were issued and accepted for the transportation of the salmon in question, which bills of lading became binding contracts of both the appellee and the vessel, for the carriage of this cargo. That appellee failed to comply with the terms of such bills of lading relative to filing claim for their alleged damage, and bringing suit therefor, and therefore this suit was barred.

Appellant's Assignment of Errors Nos. II, III, IV, V, VI, X and XI will be discussed under this heading.

III.

Appellant will claim that, even if the vessel be found unseaworthy, the evidence wholly fails to show that appellee was damaged in any sum whatever on account of depreciation in market price of this salmon during the period of reconditioning; but that, on the contrary, the only evidence in the case on this question shows beyond controversy that appellee suffered no loss whatever on this account; and that under the evidence and the law applicable thereto, appellee is not entitled to recover the sum of \$7,935.00, or any sum whatever for damages on account of depreciation in market price.

Appellant's Assignment of Errors Nos. VIII and IX will be discussed under this heading.

IV.

Appellant will claim that even if the vessel be found unseaworthy, the uncontradicted testimony of appellee's witnesses shows that the sum of \$4,283.06, allowed as damages for the cost of reconditioning the cargo, is largely in excess of the actual amount paid or incurred by appellee for such reconditioning, due to damage received on the vessel; and that in any event this item of damages must be greatly reduced.

Appellant's Assignment of Errors No. VII will be discussed under this heading.

V.

If the vessel should be held liable for any damage in this case, but the award made by the trial court be reduced in any particular, any allowance of interest in the judgment upon the amount of such reduction would also be disallowed.

SPECIFICATION OF ERRORS RELIED UPON.

I.

The said court erred in holding, finding and decreeing that the said steamship "Jeanie" was unseaworthy upon the voyage in question in said cause.

II.

The said court erred in holding, finding and decreeing that there was an oral understanding or agreement for the transportation of the cargo involved in said cause upon the said steamship upon the said voyage.

III.

The said court erred in holding, finding and decreeing that no bills of lading for the transportation of said cargo upon said vessel on the said voy-

age were delivered to any officer or authorized agent of said libelant; and that the watchman to whom such bills of lading were delivered were utter strangers to any responsible or authoritative head of said libelant company.

IV.

The said court erred in holding, finding and decreeing that the bills of lading, issued and delivered for the transportation of said cargo upon said vessel on said voyage, were not binding upon the parties hereto, but were inoperative, and that said vessel and claimant herein were not released from liability for all or any part of the damage to said cargo upon said vessel on said voyage by reason of the failure of said libelant to comply with the terms and conditions of said bills of lading relative to filing claim and commencing suit for such damage.

V.

The said court erred in holding, finding and decreeing that said vessel, and claimant herein, were not exempt from liability for all or any part of the damage to said cargo upon said vessel on said voyage, under the terms of the Act of Congress commonly known as the Harter Act.

VI.

The said court erred in holding, finding and decreeing that the said vessel, and claimant herein, are liable to libelant for all or any part of the damage to said cargo upon said vessel on said voyage.

VII.

The said court erred in awarding and decreeing to libelant herein as and for its damage, on account of injury or damage to said cargo upon said vessel on said voyage, the sum of four thousand two hundred eighty-three and 6/100 dollars (\$4,283.06), or any part thereof, as the cost of reconditioning said cargo, in that said award was not warranted by the evidence herein and was and is excessive and erroneous.

VIII.

The said court erred in awarding and decreeing to libelant herein, as and for its damage on account of injury or damage to said cargo upon said vessel on said voyage, the sum of seven thousand nine hundred thirty-five dollars (\$7,935), or any part thereof, as the amount of depreciation of the market price of said cargo during the period of reconditioning such cargo, in that said award

was not warranted by the evidence herein, and the law applicable thereto.

IX.

The said court erred in holding, finding and decreeing that libelant herein is entitled to recover any amount whatever herein against said vessel, or claimant or its stipulator herein, on account of depreciation in market price of said cargo; and in awarding and decreeing to libelant any sum whatever as and for such depreciation in market price.

X.

The said court erred in entering judgment herein in favor of said libelant in any amount whatsoever.

XI.

The said court erred in refusing to enter judgment herein in favor of claimant, and dismissing said libel, with costs to appellant.

ARGUMENT.

THE VESSEL WAS SEAWORTHY.

Before discussing the law or the evidence bearing on the question of seaworthiness, we wish to call attention to certain allegations of negligence or fault made by appellee in its libels, which it did not offer any evidence to sustain, and abandoned in the court below. The elimination of these allegations will simplify the consideration of the questions involved; and we believe that the unfounded assertion of alleged acts of fault or negligence is proper to be considered in passing upon the question of liability for the claim asserted.

In the original libel (R. p. 7) it is alleged that "a large part of said merchandise, to-wit, 4,000 cases, was improperly stowed in the lower hold of said ship, without being properly dunnaged to protect the same from injury by displacement, and by contact with bilge water and damage by water leaking through the interior skin of the ship." The same allegation is found in both amended libels, except that no number of such cases is given. (R. pp. 20, 65.)

No claim of fault or negligence in these particulars was made in the court below; and there is

not a particle of evidence in the record to sustain such allegations. On the other hand, witness Max Gunther, second mate of the "Jeanie" on the voyage in question, who had charge of the stowage of this cargo, testified how the cargo was stowed, and that it was properly stowed. (R. pp. 345-346.) This was not contradicted, and it appears from this evidence to be true in fact. Captain Karbbe, master of the "Jeanie," also testified that the cargo was properly dunnaged. (R. pp. 272, 275.) This evidence is not disputed, and there is no evidence or claim that any damage was done to the cargo by improper or insufficient dunnage or improper stowage or handling by the ship.

It is also alleged in all three libels "That by reason of the misconduct and negligence of the master and crew of said ship, the pumps were not operated sufficiently to keep the vessel free from an accumulation of water in her hold," and that "by the negligence, carelessness, improper conduct and want of attention of the master, his mariners and servants * * * in failing to maintain adequate pumps on said vessel and to operate the same," water was allowed to collect and remain in the hold of the vessel and damage the cargo. (R. pp. 7, 9, 21, 23, 65, 68.)

There is not a particle of evidence in the case that the vessel did not have proper and sufficient pumps to handle all the water taken in by the ship, even during the extreme weather encountered; while the evidence of the master, second officer and even Pilot Thomas Cochrane, whose deposition libellant took, is that the pumps were sufficient, and were properly operated to handle all of this water, so far as was possible to handle it when the vessel was pitching and rolling in the terrific seas encountered. (R. pp. 415, 416.) But, of course, even if these allegations were true, the ship would not be liable for the failure to operate the pumps, which would be part of the management of the vessel, within the third section of the Harter Act.

Negligence and fault on the part of the master, officers and crew, is also alleged "in failing and neglecting to keep the decks of said vessel properly caulked, the hatches properly battened down during said voyage, and in failing to keep the same covered with safe, adequate tarpaulin." (R. pp. 9, 23, 68.)

This also, if true, would come within the third section of the Harter Act, and the ship would not be liable therefor; but the undisputed evidence shows that these allegations are not true.

The testimony of Captain Karbbe (R. pp. 244, 268) is that the decks were caulked in August or September prior to the voyage in question, and claimant's original Exhibit "4," returned to this court, is a receipted bill for doing this work. Mr. Dawson testified to the same effect. (R. p. 310.)

Mate Gunther testified how he covered and secured the hatches, all in the usual and proper manner. (R. pp. 351-352.) There was nothing to dispute this testimony, and no claim is made of any defect in the covering of the hatches, other than the claim that proper tarpaulins were not used, which we will consider later.

The vessel was surveyed the last of June, 1912, by competent surveyors, who found her seaworthy and in fit condition to continue on her run from Seattle to Alaska ports (Claimant's Exhibit "7"), and she was placed in dry dock the last of July, 1912, again surveyed by these surveyors, recommendations made, repairs according to these recommendations made, and the vessel then found to be seaworthy and fit to continue upon said run. (Claimant's Exhibit "6.")

Prior to running into the extreme weather encountered on this voyage, the ship took no more water than is usual with wooden vessels, and even

the severe weather encountered did not cause her to take an excessive amount of water, no more than the pumps could safely handle. These facts are established, not only by the testimony of Captain Karbbe and Mate Gunther, but also by libellant's own witness, Pilot Cochrane (R. p. 416), and were conceded by appellee in the court below.

There is no claim, nor even an allegation in either of the libels, that the vessel was not seaworthy, so far as being properly officered, manned, provisioned and otherwise equipped and supplied with everything necessary to safely make the voyage in question, except the implied, rather than the express, allegation of want of pumps, which was abandoned, and the claim of want of proper tarpaulins. In fact, it has not been claimed, and cannot and will not be, that the vessel lacked anything necessary to safely care for and carry this cargo on this voyage through any weather which might be expected, other than the claim of improper tarpaulins.

This feature of the case is, therefore, narrowed to the charges of unseaworthiness from alleged want of proper cleaning after discharge of the coal, and from alleged want of proper tarpaulins and insufficient caulking of the deck seams.

To be seaworthy in these particulars it is not necessary that a vessel have the newest tarpaulins, nor any particular number for each hatch; nor that every crack or seam in deck and hull of this wooden vessel be so caulked that no weather or straining could possibly work the caulking loose or open a seam; nor so tight that no water could enter the ship under any possible conditions or in any weather; nor that she be so clean that not a particle of dust or dirt could fly in handling cargo, or in the working of the ship, and get upon cargo. Such conditions are absolutely impossible, and are not required by the law.

“But the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is *perfect*, and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it.”

Carver's Carriage by Sea (4th Ed.), p. 21.

“The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.”

Hutchinson on Carriers (3rd Ed.), Sec. 366.

“The seaworthiness of a vessel is to be determined with reference to the customs and usages of the port or country from which the

vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is really attributable to the ship or her owners.”

36 *Cyc.*, p. 249.

In the case of *The Sandfield*, 92 Fed. 663, decided by the Circuit Court of Appeals of the Second Circuit, it was claimed a vessel was unseaworthy because a rivet in one of the steel plates below the water line became loosened on the voyage by the vibration of the vessel while straining and pounding, in weather of extraordinary severity. The court said that apparently the hole in the plate was not perfectly fair with the hole in the frame when the rivet was originally driven, and in consequence the rivet was not long enough when battered down to completely fill the countersink which broke off. The witnesses testified that on the voyage in question the weather was the worst ever encountered in their experience. The court used this language:

“Undoubtedly the rivet was not as perfect as the workman might have made it, and was less capable of resisting the effects of strain and vibration than if it had been as absolutely strong and perfect as the best or average of the many thousand rivets in the vessel, but we

agree with the district judge who decided the case in the court below that 'any such mere inequality in the strength of the rivets does not amount to unseaworthiness.' Whether the vessel was unseaworthy or not is to be determined by the test whether she was reasonably fit for the contemplated voyage. (Citing authorities.) If she was, it matters not that she was not impregnable to the assaults of the elements. If a vessel is reasonably sufficient for the voyage, and is lost by a peril of the sea, her owner is not responsible, as a carrier, for the cargo lost, upon proof that a stouter vessel would have outlived the storm."

After fully discussing the evidence in the case, the court concluded that the vessel was seaworthy "and that the rivet was fractured and loosened by the extraordinary strain inflicted upon it by stress of weather."

This case is particularly in point on the question of the leakage around the anchor locker, and through the seam near the forward hatch, which, as we will later point out, was caused by the straining of the vessel in the extraordinary seas encountered. This case is approved in a similar case decided by Judge Brown, in *The Ontario*, 106 Fed. 327, which was later affirmed on appeal.

Another case in point is *The Newport News*, 199 Fed. 968.

We also call the court's attention to the case

of *Cook vs. Southeastern Lime & Cement Co.*, 146 Fed. 101. This case is particularly in point, as it involved water damage to cargo carried on a wooden vessel, which leaked through the opening of some of its seams, caused by heavy seas encountered. The court discussed the evidence, which is very similar to the testimony of the navigating officers in this case, and used the following language:

“The rolling of the ship, in what all the witnesses testify to have been uncommonly rough and heavy seas, with the attendant straining, furnishes a sufficient and reasonable explanation of the leaking. This rolling would prevent the pumps from exhausting all the water, and the damage from the blowing off the sea water from the hold, and from the taking in of water through the hatches, was a damage which could not have been avoided by the use of ordinary care. No human strength could resist, and no human foresight could prevent, the operation of these elements. Absolute impregnability to the assaults of the elements is not the test of seaworthiness. The test is whether she was reasonably fit for the contemplated voyage. Nor is there any rule which defines with unfailing accuracy the degree of violence of winds or waves which constitute a peril of the sea. Cross-seas of unusual violence are sometimes so held, and there is a case which holds that the blowing of the vessel is a peril of the sea.”

Another case very much in point is the case of *The British King*, 89 Fed. 872, decided by Judge

Brown, of the Southern District of New York. The syllabus of the case, which indicates the holding of the court, is as follows:

“Chemicals and rags being damaged by sea water from leaks in a steamer’s ballast tank, which was found sprung and the rivets started and broken after heavy weather; *held*, upon evidence of first-class construction, careful inspection and good stowage, that the leak was sufficiently explained by the heavy weather that preceded it, and that the vessel was seaworthy; also *held* (2) that lack of proper attention to the pumps, which might have earlier disclosed the leak and prevented the damage, was negligence in the ‘management of the ship,’ for which the ship was not liable under the Harter Act; also *held* (3) upon proof that the sluice-valve in the bilges connecting compartments 4 and 5 was not watertight, that this fact did not constitute unseaworthiness, even if it existed at the commencement of the voyage, because not a failure in any necessary requirement, and because any leak therefrom would be sufficiently guarded against by proper attention to the pumps. The complaint was therefore dismissed.”

This case is cited with approval in the latest decision in point on this question we have found, and to which we particularly call the court’s attention. This is the case of *Griffin vs. Davison Lumber Co., Ltd.*, 224 Fed. 648, decided by Judge Morton, of the District of Massachusetts. The damage there was to a cargo of lumber, caused by water and by coal dust and dirt. The court held the ves-

sel liable for the coal dust damage, but not liable for the water damage. The court used the following language:

“Whether she is also liable for the water damage depends upon whether she was tight and seaworthy when she put to sea. She was forty years old, but she had been thoroughly rebuilt less than a year before, and reclassified A 11½ for four years. Her master and steward testify that she was all right. The only evidence to the contrary is such as can be inferred from the fact that in a severe, although not extraordinary gale, during which she shipped a heavy sea which damaged her forward, she was so strained as to open her seams, and leaked so fast that the hand pumps were unable to keep the water down. The seas were unusually bad, and the vessel was forced to carry sail. The uncontradicted evidence is that under such conditions seaworthy wooden vessels are likely to leak. Some of the leakage may be attributable to the strain caused by the sea which came aboard. While the question is close, and the burden of proving compliance with the warranty is on the vessel (*The British King* (D. C.), 89 Fed. 872), it does not seem to me that the warranty that the vessel was tight and seaworthy at the beginning of the voyage was broken (*The British King, supra*). The injury to the cargo caused by the leakage of water alone is attributable to perils of the sea for which the vessel is not responsible.”

The “Jeanie” was a wooden vessel; she had been in this same service about twelve or fourteen years, and had been in practically the same condition all the time. As we have already shown, she

was surveyed by competent surveyors in June preceding the voyage in question, and found seaworthy and in fit condition. Some repairs were made in July, and she was again surveyed by these same surveyors and found in good condition. Some caulking was done in September. There is no evidence that she leaked any more than all wooden vessels leak; nor that her hull, decks or hatches had leaked prior to this voyage. Her master considered her seaworthy and in good condition upon leaving Seattle for the voyage in question. (Testimony of Captain Karbbe, R. p. 244.) Mr. Swan, one of her charterers, testified that she was then "apparently in good condition." (R. p. 320.) Mr. Dawson, the other charterer, who had been in the shipping business some twenty-four years, testified that "she was in first-class condition" at that time. (R. p. 309.) Mr. Gunther, her second mate, testified "she was in a seaworthy condition, in my opinion." (R. p. 342.) And even libellant's own witness, Pilot Cochrane, in answer to both direct and cross-interrogatories, testified that she was "perfectly seaworthy." (Cochrane's deposition, R. pp. 413, 416.)

This testimony is undisputed, and certainly is conclusive, so far as the general condition of the vessel is concerned on leaving Seattle.

It may be claimed that the vessel strained and became unseaworthy because she stranded in Wrangell Narrows on her outward voyage. But the court certainly cannot assume this to be true, without a particle of evidence to that effect; while the undisputed evidence is that the vessel sank a little in soft mud between tides, and floated without aid. (Testimony of Captain Karbbe, R. pp. 245-247; testimony of Mate Gunther, R. p. 343.) No repairs were necessary because of this stranding. The United States Marine Inspector at Juneau considered that this stranding did not hurt her (R. pp. 247-248, 293), and she did not take any more water after than before. (R. p. 248.) Nothing happened to the ship at any time prior to loading this cargo, which it can be claimed rendered her unseaworthy in any particular, other than her state of cleanliness and her tarpaulins. Appellee contended and the court found that the vessel did not have proper tarpaulins for the hatches, and was therefore unseaworthy. The evidence offered by appellee to sustain this contention is as follows:

F. O. Burckhardt, Vice-President of appellee, testified that he "made an examination of the tarpaulins that had been on this forward hatch, and found that they were in bad condition, and a lot

of very fine pin-holes.” (R. p. 85.) On cross-examination he admitted that he had only examined two tarpaulins (R. p. 98); but the evidence shows that there were three tarpaulins for each hatch. Mr. Roberts claimed the master had admitted to him that the tarpaulins were old and leaked (R. p. 113), but, on cross-examination, he stated that the master had said the hatches were properly battened, “but my tarpaulins were old” (R. p. 118), not that they leaked.

Mr. Charles A. Burckhardt, President of appellee, testified that he “examined the tarpaulins and they were absolutely rotten.” (R. p. 154.) On cross-examination he said that he had previously heard these tarpaulins were rotten, and saw some tarpaulins on deck near the forward and after hatches, which he took hold of and tore, but he did not know that these were the tarpaulins used to cover the hatches. (R. pp. 167-168.) They may have been the ones used to protect the cargo in the hold from coal dust. (R. p. 346.)

On the other hand, Captain Karbbe testified that each of the four hatches had one tarpaulin cover that was “new that spring” and “in good condition” (R. pp. 259, 292, 297); that they had made only one trip with these new tarpaulins, and

that all the others "were fair tarpaulins." (R. p. 297.) Also West's testimony. (R. pp. 329-330.)

Mate Gunther testified that the hatches were secured by first covering them with 2 x 12 planks, wedged at the ends, the cracks were then caulked with oakum driven in, then each covered with *three* tarpaulins, and fastened with iron battens and wedged. (R. pp. 351-352.) He said that no water could get through the hatch so covered unless the oakum worked out (R. p. 352), and that none of it did work out, as the sailors had to take hooks to pull it out when uncovering the hatches at Seattle. (R. p. 352.)

The undisputed evidence is that only about 4,088 out of the entire 29,657 cases in this shipment were damaged by either water or coal dust, or both; and of this number not to exceed 3,000 were wet by water. Mr. West, who examined the cargo while on board the ship, found only about 600 cases wet under or near the forward hatch (R. p. 330), while about 800 cases forward and near a bulkhead were wet, and the cargo aft was reported in good condition. (R. p. 333.) We think the undisputed evidence shows that this cargo near the hatch was wet because of the opening of a seam or crack between the deck and hatch coaming, due to the

straining in the terrific weather encountered, and not to water going through the hatch covers or tarpaulins; while the balance of the water damage was from water entering other cracks also opened because of the straining. Certainly, in face of the undisputed evidence of the unusually severe weather the ship was in, and the small amount of water damage or water which entered the ship, and the evidence of the care taken in covering and protecting these hatches, the court cannot find that these tarpaulins were "rotten" and the ship was, therefore, unseaworthy. On the other hand, we believe the court will find that all of the water damage was from water entering through cracks in the deck or hull, which opened because of the great and continuous strain the ship was subjected to. This is proved by the testimony of Mate Gunther, who said it "came in through the deck right close to the hatch, near the hatch coaming" (R. p. 356), and through seams which were opened about the anchor locker by the working of the ship in the rough water (R. p. 357); also by the testimony of Mr. West that the forward bulkhead near the anchor chains was wet. (R. p. 331.)

Appellee will admit that the weather encountered by the vessel on this voyage was terrific and

continuous for days. It will claim, of course, that it was such weather as should have been anticipated in those waters at that time of the year. The only evidence as to the weather is the testimony of Captain Karbbe and Mate Gunther, witnesses for appellant, and Pilot Cochrane, whose deposition was taken in behalf of appellee. We would respectfully ask the court to read this testimony on the weather encountered, and then consider the small amount and character of water damage to the cargo, and the small amount of water which reached the ship's hold, and we believe the court will be satisfied that a vessel, which could stand that strain with so little damage to herself or cargo, was seaworthy so far as protecting the cargo from water is concerned; and that if a vessel is ever to be exempted from damage from perils of the sea, the "Jeanie" should be under the evidence in this case.

Captain Karbbe testified that after leaving Sitka for Sulzer, they encountered a "strong southwest swell," with a wind "about forty miles an hour;" that "the sea was enormous, these cross-seas, across from southeast, southwest and westerly swells, they just came up and they just—Oh, I never saw anything like it. I never saw any worse in all my work at sea. She took it (water) clean all

over.” (R. pp. 251-252.) He said he left Sitka in the morning and returned about eleven o’clock that night, and tried to go out later but had to turn back again after three hours. (R. p. 252.) The vessel took no more water inside than the pumps were able to take care of. (R. pp. 254, 257.)

After leaving Ketchikan on the way to Seattle, after all the salmon was aboard, very bad weather was encountered. Captain Karbbe testified that they had “all bad weather—I never saw it before.” That after they left Seymour Narrows they struck “a sixty-mile gale, with snow” and from 3:30 one afternoon until 11 o’clock the next day, they made only thirty miles, going full speed. (R. p. 256.) That it was “an awful sea, terrible sea; she was filling her decks all the time.” (R. p. 256.) He also said this was not the weather he would expect to encounter at that time of the year, not so constant; that it was an unusually rough voyage. (R. p. 290.)

Mate Gunther testified that they “tried to go to Sulzer, but it was too rough to make it.” (R. p. 347.) “It was so rough we had to turn back again;” that the vessel “took water over the fore-castle head and over the decks;” that one night they could not steam against the sea nor turn back, “so

we hove her to.” (R. p. 348.) He also testified that they “ran into a heavy gale in the Gulf of Georgia, some weather like I never seen in my life before;” that the heaviest of it lasted seven or eight hours. (R. p. 352.) “It was a gale I never experienced in the Gulf of Georgia, and as far as I know, nobody else aboard ship ever saw it blow as hard as it did that day. It was impossible to make any headway.” (R. pp. 352-353.)

Appellee took the deposition of pilot Cochrane, of the “Jeanie,” on this trip, and he also testified that these were “the hardest gales I have ever seen in Alaska waters.” (R. p. 414.)

We submit that a vessel which could stand this weather with so little damage should not be held unseaworthy in this respect.

It may also be claimed that the vessel was unseaworthy because the bilge water forced a plank of the skin of the vessel loose, permitting a little water to come through. When the court considers the undisputed testimony of Mate Gunther, that this plank was sound and had been properly nailed, and, when renailed, held in place all right (R. p. 365), and considers how the vessel worked and rolled in the seas, causing the water always in the bilges of

every vessel to strike against this skin, we believe it will find that this fact did not render the vessel unseaworthy, under the same rule applied in the rivet case above cited.

But the loosening of this plank did very little damage. It happened after the Chilkoot salmon was aboard, but long before the other two shipments were received. The plank was promptly re-nailed and held in place. (R. p. 365.) This plank was forward near the Chilkoot salmon, which was also under the seams which opened about the hatch coaming and chain locker, and the court will see from Exhibit "1" that the proportion of damage to this salmon was only a little more than the damage to the other shipments. The loosening of the plank, of course, did not damage the two shipments received later, and could have caused very little of the water damage to the Chilkoot salmon, and is not worth considering.

The foregoing covers all the testimony relative to unseaworthiness, so far as water damage is concerned, and we believe fully sustains our contention that the vessel was, in fact, seaworthy in this respect. We therefore have only the question of cleanliness to consider.

This vessel carried north a cargo of bulk coal. A portion of this coal was discharged at Juneau, before any salmon was taken aboard. This coal was discharged from the forward lower hold. There had been no coal in the forward 'tween deck (testimony of Gunther, R. pp. 345, 361). After this coal was discharged, the hold was thoroughly cleaned. Mate Gunther testified as follows:

“Q. What steps, if any did you take to clean out the hold before putting the salmon in?

A. Well, first, we scraped it out—scraped it out with shovels, then we cleaned it out and scraped it out again, and then we cleaned it and swept it out again.

Q. What was the condition of the hold when you finished?

A. Well, it was as clean as we thought it was necessary to put in salmon; it was clean as it ever was.

Q. Could you get it any cleaner?

A. No; I could not get it any cleaner.”
(R. p. 345.)

Afterwards the Chilkoot salmon, 10,748 cases (claimant's Exhibit “1”) was taken aboard. This was stowed in the forward lower hold, where there had been some coal, and also the forward 'tween deck, where there had been no coal (R. p. 344); it was properly stowed and dunnaged (R. pp. 345-346), and precautions taken to prevent coal dust

getting on it. Mate Gunther testified as follows, which is not disputed:

“Q. Did you take any precautions to keep the coal dust from getting on that salmon?

A. Yes; we took tarpaulins and sails; we had an old mainsail there and an old foresail on the ship that we did not use, and an old jib; we had a new jib, and we covered the salmon all up, and we took the covers underneath them under the edges and nailed them and then took battens and nailed them fast on the side of the ship, so that there would be no possibility of dust getting in the salmon.

(R. p. 346.)

Q. How was this Chilkoot salmon protected from coal dust at the time you were putting it in the ship?

A. How was it protected from coal dust?

Q. Yes. There were no bulkheads between there and where the coal was?

A. We put covers over the salmon, old sails and a lot of covers; we nailed the pieces at the top against the beams and the sides were battened, so that there was no coal dust could get at the salmon.

Q. That was after the salmon was in, but while taking it in was there any protection against coal dust?

A. There was no dust blowing at the time; we did not touch the coal; the coal was away back from where we were stowing the salmon; it was not anywheres near the salmon.

Q. Was the ship lying still?

A. The ship was lying still alongside the dock; no dust floating at all."

(R. pp. 361-362.)

This protection was left up during the entire voyage. (R. p. 363.) Afterwards the balance of the coal was discharged at Ketchikan. The evidence does not show that any of this Chilkoot salmon was injured by coal dust, and we think the contrary appears. It will be seen from Claimant's Exhibit "1" that only 1,680 of the 10,748 cases were damaged at all. The three largest lots sustained only trifling damage of any kind, while one lot of 1,583 cases of unlabeled cans did not sustain any damage whatever. The smaller lots were all damaged. It will be remembered that this salmon was stowed forward where the water came through the anchor locker, and below where the water got through the loosened plank of the skin. This included the 800 cases which Mr. West found water damaged. Mate Gunther saw this damage before the ship reached Ketchikan to unload the coal. (R. p. 349.)

We therefore think it fairly appears that this lot of salmon sustained no coal dust damage at all. Its damage, being water damage, caused as shown above, resulted from a peril of the sea, for which

the ship was not liable. But even if it was damaged by coal dust, it was because, *after it was aboard*, the master and crew did not properly protest it from the dust of the coal afterwards discharged. This would not constitute unseaworthiness, but would be an error in management or navigation, within the protection of the third section of the Harter Act.

Corsar vs. J. D. Spreckels & Bro. Co., 141 Fed. 260.

After the balance of the coal was discharged at Ketchikan, the vessel was thoroughly cleaned as before (testimony of Captain Karbbe, R. pp. 254-255; deposition of Banbury, R. p. 433). Afterwards the Yes Bay (14,172 cases) and Cholmley (4,737 cases) salmon were taken aboard.

It would seem to us that this undisputed testimony proves conclusively that the vessel was seaworthy in this respect for carrying these shipments on this voyage. Certainly, all was done that a reasonably prudent man could do to make the vessel clean enough to carry cases of canned salmon. And even if a small amount of coal dust remained, after all the efforts to clean the vessel, it was not sufficient to render the ship unseaworthy, or liable for the large claim here asserted. This appears all the more clear when it is considered that, out of the

18,909 cases loaded at these last two canneries, only 2,408 sustained any damage *at all* (Claimant's Exhibit "1"); also that a large part of this damage was caused by water which entered the ship because of stress of weather. It will be remembered that much of this last mentioned salmon was in the forward hold and forward 'tween deck, where it was wet, as we have already shown. Certainly, the 600 cases under the forward hatch were from these shipments; and Mr. West estimated that not over 15% of the total damage was from the coal dust. (R. p. 336.) None of the other witnesses could give any estimate.

It would seem to us that the foregoing evidence shows conclusively that the vessel was seaworthy in fact in all particulars; in any event, that the owner, charterer and officers used all precautions and care required by the law to make her so. At least, we think that the evidence we have referred to shows that appellant overcame any presumption of unseaworthiness arising from the fact of damage to the cargo, and that appellee wholly failed to meet this evidence, and therefore is not entitled to recover anything in this suit.

Clark vs. Barnwell, 12 How. 272.

The Portuense, 35 Fed. 670.

Wolff vs. The Vaderland, 18 Fed. 733.

The Good Hope, 197 Fed. 149.

The Henry B. Hyde, 90 Fed. 114.

The Dolbardorn Castle, 212 Fed. 565.

The Folmina, 212 U. S. 354.

The Anna, 233 Fed. 558.

However, if the court should be of the opinion that the vessel is liable for either water damage or coal dust damage *alone*, the judgment would have to be limited to such part of the recoverable damage as resulted from such liability. The only evidence in the case as to the amount of damage from each cause is the estimate of Mr. West that about 15% was coal dust damage, and the award would have to be made on this basis.

BILLS OF LADING.

If the court finds that the vessel was seaworthy, or there is not sufficient evidence to hold her liable on the ground of unseaworthiness, that will end the case, and nothing further need be considered. But if the court finds the vessel unseaworthy in any particular, causing damage, we still contend that the ship is not liable under the terms of the bills of lading. These bills are attached as exhibits to the deposition of Purser Banbury. (R.

pp. 435-461.) He testified positively that the bills were signed and delivered to the respective representatives of appellee at each cannery, who delivered the different shipments to the vessel, and at the time of such delivery. (R. pp. 431-435.)

Appellee did not offer the testimony of either of the persons actually in charge of the salmon at the canneries, who delivered the salmon to the ship, to disprove this testimony of the purser; nor was any reason given why it did not do so, if the statement of the purser was untrue.

Appellee relied solely on the testimony of two of its officers, as follows: On his examination in chief as a witness for appellee, Mr. C. A. Burckhardt, President and Manager of appellee, was asked this question by its counsel, and answered as follows:

“Q. Have you in your possession or under your control any of the bills of lading or copies of them, that were issued for this shipment?”

A. They were delivered to the warehouse people as soon as the goods arrived.”

(R. p. 158.)

On cross-examination this witness was interrogated and answered as follows:

“Q. Your bills of lading were delivered to the warehouse man?”

A. Yes, sir.

Q. And as far as you know, they are still in his possession?

A. Yes, sir." (R. p. 183.)

Later this witness was recalled by appellee, and he attempted to explain this positive statement by saying:

"As far as this shipment is concerned, we have no records of any bills of lading having been delivered to us. I take it for granted that the bills of lading were delivered to the warehouse, not through any direct knowledge except their custom. I always understood they were delivered there or to Kelley-Clarke Company; and we received none at the office and there are none on file in our office now, nor has there ever been any."

(R. p. 393.)

The witness also attempted to claim that the cannery watchman would not understand what a bill of lading was, and if he took one would keep it in the cannery file, but that the next spring the witness did not "observe or notice" any such bill of lading among these files, but did not say that he searched to find if they were there. (R. p. 394.) He also stated that about November 24, 1914, he had "occasion to make an examination of the papers on file and the records" of appellee at Portland, but did not "find among these papers or rec-

ords any bills of lading, or reference to bills of lading referring to these shipments.” (R. p. 394.)

The witness did not even say he made any search for these bills, or even had them in mind when he examined the Portland office files. It certainly would not disprove the positive statement of Purser Banbury, to even show that copies of these bills of lading were not among the cannery files months after the shipments were made, nor among the Portland office files nearly *two years* afterwards, although this testimony does not even prove that much. If, as stated by the witness on his first examination, the bills of lading were delivered to the warehouse when the goods arrived, they would not be among the files at either place. No one connected with the warehouse was called to disprove this statement of the witness.

Witness F. O. Burckhardt, vice-president of appellee, was also recalled by appellee, and testified as follows:

“Q. What do you know about any bills of lading having been issued or delivered to anybody, for this shipment of goods?

A. I never saw any bill of lading that was delivered to myself or any of the employees of the company.

Q. Did you see any bill of lading in the hands of

the consignee or the wharf or the warehouse people, or Mr. Swan, or anybody else?

A. I do not remember as to whether Mr. Swan had a bill of lading or whether I saw one in his possession or not.

Q. Well, how about seeing it in anybody elses?

A. I do not remember seeing a bill of lading in anybody's possession.

Q. At the cannery, was there any bill of lading left or found there, to your knowledge?

A. No, sir.

Q. Did the watchman up there ever report to you anything about a bill of lading?

A. To my knowledge there was never, at any time, any shipment of salmon was there a bill of lading delivered to my watchman at Chilkoot.

Q. That is the cannery you had charge of?

A. Yes, sir.

Q. Do you know, Mr. Banbury, the purser of the Jeanie, on that trip?

A. Yes, sir.

Q. Have you had any conversation with him about bills of lading for this shipment?

A. I had a conversation with Banbury in Juneau.

Q. Fix the time, as near as you can.

A. Sometime during the month of November, 1914.

Q. Now, in that conversation, did Mr. Banbury tell you positively that he did not deliver any bill of lading to the watchman at the cannery?

A. He told me he was not sure as to whether or not bills of lading had been delivered to the

watchman at Yes Bay or Chumley, but his impression was that they had not been so delivered; that as far as Chilkoot was concerned he was absolutely positive that no bill of lading had been delivered to the watchman, for the reason that he was under the impression that my watchman could neither read nor write—that is, at Chilkoot. And, he stated, furthermore, in that conversation, that his impression, his recollection was, that the bills of lading had all been delivered to Mr. Swan for delivery to us after arrival of the Jeanie at Seattle.”

(R. pp. 374-376.)

Mr. Banbury, in his deposition, denied having made any such statement to Mr. Burekhardt (R. p. 434; and we think the cross-examination of the witness (R. p. 387, etc.) shows that he at least misunderstood Mr. Banbury.

At any rate, the court knows that it is usual for every carrier to issue a bill of lading for goods received, and usual for shippers to require some evidence of the delivery of the goods to the vessel and of the agreement to carry them. The testimony of both officers of appellee shows this was usual with their shipments, and we certainly think the court will believe the positive statements of the purser, that he issued and delivered these bills, as he testified.

The trial court did not find that the bills were

not so delivered, but found "that these bills of lading were not delivered to any of the officers of the libelant company. If they were issued, they were delivered to the watchmen at libelant's canneries" (R. p. 482); and the decision of the lower court on this question was based on the ground that these watchmen "were not connected with the libelant company in any official relation, and who were not in a capacity to negotiate with relation to the transportation." (R. p. 482.) The court also found:

"The record shows that there was an oral understanding between the parties with relation to the shipment of this cargo, and while no terms appear to have been detailed or specifically understood, liability could not be limited except by mutual consent, and if the bills of lading were not issued to any authoritative persons and there was no understanding with relation to them, then the libelant could not be bound by their stipulations."

We think the trial court was in error in finding that there was any such oral understanding. No officer or person representing appellee testified to any such understanding. The only evidence on this question is the following, given by Mr. Swan, one of the charterers of the vessel:

"Q. Did you send the order to Captain Corby that was received at Chilkoot and Yes Bay and Chholmley, to bring down that salmon?"

A. I think I did; yes.

Q. That was on the request of Burckhardt or some one representing the Alaska Pacific Fisheries, was it?

A. Yes, sir.

Q. To bring out their goods?

A. Yes, sir."

(R. pp. 323-324.)

The request "to bring out their goods" did not constitute an "oral understanding" amounting to an agreement imposing the common law obligation of a carrier upon the vessel afterwards receiving the goods and issuing a bill of lading therefor, which was received by the person in charge of the goods, and authorized to deliver them to the ship. We think that it amounted, both in law and in fact, to a request to "bring out" these goods according to the terms of the usual bill of lading issued by such carriers therefor; and that both parties contemplated the issuance of such a bill of lading, and appellee is bound by the terms of the bills issued in this case.

These bills contain the following provisions:

"The carrier shall not be liable for loss or damage occasioned by causes beyond his control, by perils of the sea, or other waters
* * * by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull,

machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them.

The carrier shall not be responsible * * * for breakage of any property packed in boxes, barrels, crates or bales when such packages do not present evidence of rough handling or improper stowage * * * or for loss or damage resulting from providential causes. * * *

It is understood that the carrier's vessels are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can secure it; and the carrier shall not be liable for loss, detention or damage arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel, provided reasonable measures have been taken to secure efficiency."

Section 2 of the Harter Act provides:

"That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence (to) properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and

stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

While this section does not relieve the carrier from the duty to use "due diligence" to make his vessel seaworthy, yet, having done so, he is permitted to contract against the obligations of seaworthiness.

Hutchinson on Carriers (3rd Ed.), Sec. 363.
The Carib Prince, 170 U. S. 655.

These provisions of the bills of lading certainly exempt the ship in this case from liability, due to the entry of water through seams opening because of the terrible weather encountered, or the small amount of coal dust which it was impossible to get out of the ship.

The owners and charterers, having furnished a vessel in every way seaworthy and able to stand such unusual and unexpected weather, and having proper officers and crew, who used every reasonable precaution to clean the vessel for this cargo, and having properly stowed and handled it, ought not to be held negligent and liable on account of the small amount of damage which resulted from coal dust getting into these cases. To hold otherwise, would make the carrier an absolute insurer against damage, which is not the rule in water

shipments, and against which it protected itself by contract in this case.

“Libelants, next observing that *The Newport News* herself suffered no serious injury, and that no other underdeck cargo received hurt, declare that no peril of the sea within the legal meaning of that phrase has been shown. But it is to be remembered that, in order to find peril of the sea, the losses sustained need not be extraordinary, in the sense of necessarily arising from uncommon causes. Rough seas are common incidents of a voyage, yet they are certainly sea perils, and damages arising from them are within the exception if there has been no want of reasonable care and skill in fitting out the ship and in managing her. *Carver* (4th Ed.), § 87. The violence of the sea here shown, acting upon a well stowed deck cargo, is, if sufficient to proximately account for all that happened, a peril of the sea, within the opinion in *The Frey*, 106 Fed. 319, 45 C. C. A. 309.”

The Newport News, 199 Fed. 968, 971.

The bills of lading also contain the following provision:

“All claims for damage to or loss of any property to be presented to the carrier, or the nearest agent thereof within ten days from date of notice thereof—the arrival of vessel at port or place of discharge, or knowledge of the straining or loss of vessel to be deemed notice—and that after sixty days from such date, no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property, and a failure to present such claim within said ten days, or to bring suit

within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said carrier or any of the stockholders thereof, for any damage or loss. The claim for loss or damage to any of the said property shall be restricted to the cash value of same at the port of shipment at the date of shipment.”

(R. p. 458.)

It is well settled that such a provision in a bill of lading is valid and binding, where the bill of lading is issued and accepted. It is also well settled that the purpose of such provisions, as to notice, is to give a carrier an opportunity to investigate claims made against it, before the evidence is lost or destroyed, so as to protect itself against improper claims, or settle proper ones.

In this case there is no evidence that any claim was ever presented to anyone, except possibly to Mr. West or Mr. Forman, who represented underwriters on the ship. It is true that both the underwriters' representatives and the charterers knew, upon arrival of the vessel, that the cargo had sustained some damage. While the vessel was being unloaded, about 2,000 cases which appeared to be damaged were set aside on the dock, while the balance was supposed to be undamaged and was sent to the warehouse. (R. p. 216.)

Mr. Horner was then instructed by some one to recondition some salmon. There is a dispute in the evidence as to what Mr. Horner was to do. He and Mr. Burekhardt testified that they understood he was to go over and recondition the entire cargo. But Mr. West (R. p. 327), and Mr. Dawson, representing the charterers (R. p. 314), understood that Horner was only to recondition what had been set aside as damaged. In fact, there was then no occasion to talk about the balance of the cargo, as it was supposed to be undamaged. If this knowledge of damage to these 2,000 cases is sufficient notice of claim for damage to them, it certainly was not notice of any claim for damage to the balance of the cargo.

Mr. Horner actually went over the entire cargo, but no notice was given anyone connected with the charterers or owners of the ship, or even the underwriters, that this additional work was being done, and no claim was ever made or presented for this work on the cargo which was supposed to be undamaged, and in fact was practically all undamaged, until after the work had been completed nearly three weeks, when Horner's bill was presented. At that time all evidence of damage, if any, had been removed, and no one interested in the ship, who

might then have heard for the first time of the claim for such large coal dust damage, and damage to the supposedly undamaged cargo, could secure any evidence about the matter.

This salmon had been stored for many months in warehouses in Alaska; but as neither charterers, owners nor underwriters on the ship had any notice that it was claimed that any of the cargo, except the 2,000 cases on the dock, was damaged, they had no opportunity to investigate and see whether this additional damage was coal dust damage or water damage, or damage from being held in the Alaska warehouse or from any other cause, or existed at all. The importance, to appellant, of being able to make such an investigation appears the clearer, in view of the fact, shown from Exhibit 1, that all the damage covered by Horner's bill was not caused by the ship. We will point this out in detail later. Nor was any claim made for loss of market price at any time, until March, 1914, a year later, when the first amended libel was filed.

We submit that the provision of the bills of lading issued, requiring notice of claim to be given, was a valid part of the contract of carriage of this salmon, and that this provision, not having been

complied with, in letter nor even in spirit, the claim was waived.

We also contend that this suit will not lie, for failure to bring the same within the time limited in the bills of lading. The suit was not brought until *nine months* after the goods arrived. But appellee seeks to avoid the effect of this stipulation of the bills of lading, by the agreement dated April 7, 1913. (Exhibit "B.")

The original libel was verified September 16, 1913. In October an amended answer was filed, setting forth and relying upon the condition of the bills of lading relative to filing claims and bringing suit. In March, 1914, an amended libel was filed, but it contained no suggestion of any agreement waiving, or which appellee claimed waived, this condition of the bills of lading.

On February 15, 1915, after all of appellant's testimony in the case had been taken, and the day before appellee took its testimony in rebuttal, a second amended libel was verified, in which, for the first time, the agreement of April 7, 1913, was mentioned, notwithstanding the fact that this agreement was made nearly two years before, and long prior to the commencement of this suit. No ex-

planation is given for not mentioning this agreement before.

However, we do not think this agreement in any manner waives this condition of the bill of lading. No authorities are necessary to show that this provision of the bills of lading is valid. The cargo arrived January 8, 1913, no claim was presented for damage within ten days, nor at least, if at all, until about the time the Horner bill was paid, about April 8, 1913, three months after the arrival of the vessel, and even more than ten days after the work of reconditioning the cargo was completed.

This suit was not brought until September following, more than nine months after the arrival of the cargo. The agreement is dated April 7, 1913, which was 89 days after the arrival of the vessel. The intent of the agreement, as expressed in the last paragraph, is not to waive any defenses then existing, but "to place the party of the second part in the *same position* as though the Steamer 'Jeanie' had been libeled and suit begun upon the date of the signing of this agreement." The claim was then barred, the agreement did not remove this bar, and for this reason alone appellee cannot recover in this action.

LOSS OF MARKET PRICE.

If, after considering the question of liability in this case, the court should be of the opinion that the vessel is liable for any damage to this cargo, it remains to be determined what the measure of such damage is, under the evidence in the case and the law applicable thereto. In considering this question, we think the various claims of damage made by appellee in this case, even though abandoned in the lower court, will throw light on the merits of the claims which will be asserted here, and which were allowed by the trial court.

An original and two amended libels were filed in this suit. In each of these libels claim was made for the amount of Mr. Horner's bill for overhauling, etc., the entire cargo of salmon carried by the "Jeanie" on the voyage in question (R. pp. 8, 22, 66). The original libel was verified September 16, 1913, long after all damages which appellee sustained or has ever claimed it sustained had been or could have been ascertained. In paragraph X of this original libel it is alleged that the salmon in question "after being so overhauled and reconditioned was depreciated in value to the amount of twenty-five hundred dollars" (R. p. 8). In the first amended libel and second amended libel, this

claim was abandoned; and there was not the slightest excuse for ever making such claim, as the testimony of appellee's witnesses was that "Mr. Horner put it into first class condition; he put it in the same condition we claim it was in when it left the cannery" (Testimony of F. O. Burekhardt, R. p. 97; Testimony of R. E. Small, R. p. 134; Testimony of W. H. Horner, R. p. 229). C. A. Burekhardt expressly stated that appellee did not sustain this item of damage (R. p. 164).

In paragraph XI of the original libel it is alleged that because of the necessity of reconditioning this salmon, appellee was delayed in marketing the same, and thereby deprived of the income therefrom for a period of three months, to its damage in the sum of \$1,000. This claim was retained in the first amended libel; but in the second amended libel, the time was changed to 70 days, and the amount was changed to \$985.80; but the whole claim was abandoned in appellee's brief below. This, of course, was necessary in face of the testimony of appellee's witnesses, which we will particularly refer to later, from which it appears that a part of this very salmon was sold in January, 1913, after being overhauled and found or put in first-class condition, and that no part of the balance

could have been sold during the time it was being overhauled, even if it had not been damaged.

In paragraph XII of the original libel, it is alleged that 2,000 cases sustained "irremediable damage," being "in an unsalable condition," to appellee's further damage in the sum of \$4,500. This claim was abandoned in the subsequent libels and, of course, was wholly untrue in face of the evidence already referred to, and the positive statement of Mr. C. A. Burekhardt, President and Manager of the Company, that appellee did not sustain this item of damage. (R. p. 164.)

The foregoing are all the items of damage claimed by appellee in its original libel; but in its first amended libel, which was served in March, 1914, other items of damage are claimed, to-wit, \$7,935.40, "difference in the market value" of the salmon between the time the shipment arrived and the time it was fully overhauled and reconditioned; also \$778.47 for storage of the salmon during this period, and \$150.54 insurance for the same period. These items, with Mr. Horner's bill and \$985.80 loss of "income" for 70 days, instead of three months, as originally alleged, were claimed in the second amended libel.

In the court below, appellee expressly abandoned all claim for any of these items of damage, except Mr. Horner's bill and the \$7,935.00, difference in market value of the shipment, and these were the only items considered and allowed by the trial court.

The claims for depreciation in market price, loss of income, storage and insurance, all rest upon the same theory, i.e., that because of the damage to the cargo, and consequent loss of time in overhauling and reconditioning it, appellee was required to hold, store and insure it during this period, losing sales meanwhile, thereby suffering damage to the extent of such cost of storage and insurance, and depreciation in market price, and loss of the use of the income therefrom. On the other hand, if this salmon could not have been sold during the period of this delay, then no loss on account of depreciation in price resulted from such delay; neither, in such case, was libellant deprived of any income therefrom during this time, and the storage and insurance would have been the same for this period whether the salmon was damaged and had to be reconditioned, or was undamaged but had to be stored and insured, awaiting sale. Inasmuch as no claim was made or allowed in the lower court

for these items, except the item of \$7,935.00 for depreciation in market price between date of arrival of the shipment and the date it was all reconditioned, this is the only claim we need consider; although, as we have stated, the making of these other claims, and then abandoning them, and the making of this claim for the first time more than *a year* after the goods arrived, certainly should make the court scrutinize this claim with greater care, before compelling appellant to pay all or any part of it.

Appellant objects to the allowance of this item of damages, aside from the objections already made, for two reasons: First, because the undisputed evidence not only fails to show that appellee suffered any loss whatever on account of any depreciation in the market value of this salmon during the reconditioning period, but affirmatively shows that it did not suffer such loss; and, second, because there is no evidence in the case of market price upon which to base such an allowance.

We will first point out every particle of evidence in the case bearing on this question.

Mr. F. O. Burekhardt testified on his direct examination as a witness in behalf of appellee, that it disposed of its salmon through Kelley-Clarke

Company, as sales agent. (R. p. 86.) On redirect examination he stated that he could not tell the market value of this salmon at Seattle, in January, 1913, without refreshing his memory. (R. p. 100.) Later he said he did not know what the Company lost on this shipment (R. p. 392).

Mr. Heckman, appellee's next witness, said he did not know such value (R. p. 103).

Mr. Charles A. Burckhardt, testifying for appellee, was asked the following questions, and answered as follows:

“Q. If this salmon had arrived in an undamaged condition, what would have been the market value here in Seattle the date of arrival, or say January 8 or 10 or 11?

MR. BOGLE: I object unless the witness can show that they had a sale for it, otherwise the market price is not material, as there is no claim for the market price of the salmon, merely for damage to the salmon and cost of reconditioning and deterioration of the goods.

MR. HANFORD: I have to prove this in order to show we are damaged by delay.

Q. The gross amount?

MR. BOGLE: I object. The only allegation you make is damage by delay, is loss of interest during the period you were delayed in marketing the salmon.

MR. HANFORD: I want to show the computation of interest, show how much it amounts to.

A. \$85,630.40.

Q. (MR. BOGLE.) What are you reading from?

A. A statement that I prepared.

MR. BOGLE: I object unless he can show he has some knowledge of the market value of these salmon and what he is basing it on.

Q. (MR. HANFORD.) Were you keeping track and observing the price of salmon during that time?

A. Yes, sir.

Q. Have you made a computation of the interest on that valuation up to the 20th of March?

A. \$985.60.

Q. At what rate did you make that computation?

A. At six per cent.

Q. What, if any, change, any depreciation or market value occurred between the 8th of January and the 20th of March?

MR. BOGLE: I object as immaterial.

A. The market price of the salmon on March 20th was \$77,695.00.

Q. (MR. BOGLE.) You are still reading from that statement?

A. Yes; a difference of \$7,935.40.

Q. (MR. HANFORD.) State what you know about the condition of the market during January and February and March, as to it being active or dull or what it was?

A. We moved quite a good deal of salmon during January and February and March, but I

haven't any figures with me to say just exactly the amount that we did move.

Q. Do you recollect any particular sales that were made to Manila or elsewhere?

A. Yes, we made some shipments to Manila—some large shipments, but I do not recollect exactly the number of cases at this time.

Q. Well, during what periods or what months did that occur?

A. During January and February.

Q. That did not include any of these goods?

A. No, sir."

On cross-examination this witness testified that they were satisfied with the condition of the shipment after Mr. Horner had finished it (R. p. 163). He also testified that appellee did not sustain the loss of \$4,500 alleged in the original libel (R. p. 164); nor the loss of \$2,500 also there alleged on account of depreciation in the value of the salmon after it was overhauled (R. p. 164). He also testified that some of this salmon was sold by Kelley-Clarke on arrival, to the Pacific Commercial Company, at Manila, and he thought they filled this order out of other salmon on hand or that was later sent down from Alaska (R. p. 176). *The court will notice particularly the testimony we will later quote from Kelley-Clarke's representative that this particular order was in fact filled from the*

“Jeanie” salmon, and was obtained after this shipment arrived.

The witness further testified that he did not “pay much attention to that part of the details of the business. Kelley-Clarke are our sales agents. They looked after all these details for us” (R. p. 177).

Again, he said Kelley-Clarke would have the information about the sale of this salmon for Manila, and testified as follows:

“Q. Were you or were you not delayed in marketing this salmon by reason of it being overhauled?

A. Well, that is a very hard question for me to answer, Mr. Bogle.

Q. Just answer it if you can, yes or no.

A. I cannot answer yes, that would not be a proper answer, and no would not be proper. I will say that I could not answer that question, for the reason that Kelley-Clarke are in a better position to give you that information than I am.

Q. Would Kelley-Clarke be in a position to give us the information as to the marketing of this entire pack?

A. Yes, sir.

Q. And the length of time that it was held here in the warehouse?

A. Yes, sir.” (R. pp. 178-179.)

He also admitted that if they had no market for the salmon at that time, they would have had to carry it in a warehouse (R. p. 179).

Relative to his testimony about market price, he was questioned and answered as follows:

“Q. Now this statement which you were reading from as to the market prices of salmon, etc., when was that statement prepared?

A. I prepared it today.

Q. That coincides with the statement of Mr. Small, does it not?

A. Yes, sir.

Q. Is it or is it not a fact you prepared that from Mr. Small's book?

A. No, sir.

Q. How did you prepare it?

A. I prepared it from circular letters that we have on file from Kelley-Clarke.

Q. What do those circulars contain?

A. Stating the offerings of salmon at these dates and the prices.

MR. BOGLE: I move to strike Mr. Burckhardt's testimony as to the market value of this salmon on the ground that it appears that he had no personal knowledge, and he took it from records compiled by other parties.

MR. HANFORD: I think that is the only way figures can be obtained after the transactions.

A. I can testify as to prices of salmon. I can bring statements up here from Kelley-Clarke

showing the value of that salmon, what we were paid for it at these dates.

Q. What do you mean by that, what you were paid for this particular Jeanie shipment?

A. No, what we were receiving for salmon of these grades at that time.

Q. The actual sales?

A. Yes, sir.

Q. Made at that time?

A. Yes, sir.

Q. Would Kelley-Clarke also be able to give us that information?

A. Yes, sir." (R. pp. 180.)

On re-direct examination he testified as follows:

"Q. In your position as a business man engaged in the salmon packing business and marketing of salmon, keeping track as you have stated you did of the market price, you have an independent recollection of the market price in January, 1913?

A. Yes, sir.

Q. The memorandum prepared by you today from the Kelley-Clarke circular, did that memorandum or circular which you prepared from the original sources of information merely verify your recollection?

A. It simply verifies my recollection of the prices.

Q. Having reference to that and having in mind your own memory of the matter, you state these facts as testimony that you are willing to stand by?

A. Yes, sir.

Q. (Mr. Bogle). Mr. Bureckhardt, from your independent recollection, what was the market value of these salmon in January, 1913?

A. Pinks 65 cents a dozen; Chums 62½; medium reds \$1.15.

Q. What was the price in February, February 1st, 1913—that was the opening market price, was it?

A. Yes, sir. The market price of Chums during the month of February were selling from 57½ to 60 cents; Pinks 65 cents; Medium Reds somewhere around 95 cents and one dollar.

Q. That is merely your recollection from keeping in touch with the market, not from any actual sales made, that is the asking price?

A. That was the actual market price at that time which goods were selling for." (R. p. 186.)

He also testified that Kelley-Clarke would have all the information he would have relative to prices and sales (R. p. 188).

This witness was later recalled by appellee, and was asked on cross-examination if appellee had "suffered any damage whatever by reason of the delay or the time consumed in reconditioning this shipment; that you lost any market or that you lost any sale?" (R. p. 400). An objection being made that this was not proper cross-examination, appellant called Mr. Bureckhardt as its own witness, and he testified as follows:

His attention was called particularly to paragraph X of the amended libel, where it was alleged appellee had sustained this loss of \$7,935.00 by depreciation in market price, and asked if appellee had, in fact, sustained this loss or any part of it. (R. p. 401.) He dodged answering the question for sometime, but admitted that appellee was unable to dispose of this salmon during this reconditioning period; that it did not lose any sale of this salmon nor any opportunity to sell it during that time; that appellee would have had to hold the salmon, store and insure it during this period if it had not been damaged (R. pp. 401-403), and was finally asked this direct question: "*You did not actually suffer that loss, Mr. Burckhardt,*" and answered, "*As I stated before, I do not think we suffered any loss*" (R. p. 404). He testified that he did not think appellee had sold any of the "Jeanie" salmon during this period, but admitted that if Mr. Small had so testified, it was probably true, as he would know. (R. p. 405.) He also admitted that appellee had a large amount of the same brands of salmon in its warehouse at Seattle, unsold, and for which appellee had no sale, and he was asked this question:

"Q. We want to be perfectly fair here, Mr. Burck-

hardt. Is it not a fact that in making up this computation that you have just taken the amount of salmon, and you figured up the market value of it, the day it arrived and you then figured up the market value the date when the reconditioning was entirely completed, and that you put that sum in irrespective of any sale or prospective sale?

A. Well, I would say that we did.

Q. (Judge Hanford). Have you been advised by your counsel that that is the legal measure of the damages, and that you were entitled to recover that under the law.

A. Yes, sir.

Q. (Mr. Bogle). So that the question of sale or possible sale or purchase of this salmon did not enter into it at all?

A. No, sir." (R. pp. 407-408.)

We think three things appear beyond controversy from the testimony above referred to, 1st, that none of these witnesses knew anything about the market value of the salmon, at the time in question; that Mr. Burekhardt's statement about the market value was purely hearsay, from what he found in Kelley-Clarke's letters and circulars, and the objection to his testimony on this question, and the motion to strike the same were well taken; 2nd, that there was no such demand for salmon during this period, as to constitute a market or market price for this large shipment under the

established rule which we will later refer to; and, 3rd, that appellee did not, in fact, lose one cent on account of any depreciation in the market price of this salmon during the reconditioning period, and therefore should not recover any damage on that account, unless damages are to be awarded where no loss has been sustained.

But all doubt on either of these questions is removed by the testimony of Mr. Small, manager of the salmon business of Kelley-Clarke, who was called as a witness for appellee (R. p. 131), and later recalled, as appears in the record, as a witness for appellant (R. p. 297), but in reality for further cross-examination as to matters he was unable to answer on his first cross-examination, and agreed to look up later. We respectfully ask the court to carefully read and consider the testimony of this witness, as he is the only witness who actually knew anything about markets for salmon, prices therefor and how they were fixed, and actual sales made of the salmon involved in this suit. This witness testified as follows:

He was asked by counsel for appellee if he was "personally acquainted with the market price of Alaska salmon in January, 1913," and said that he was. (R. p. 132.) The court will note that he

was not asked as to the market price of salmon at Seattle, nor as to the market price of the brands and grades of salmon involved in this suit, but merely the general question as to the market price. He was then asked as to the market price of Alaska Chums in January, 1913, *per case*, but this question did not refer to either the shipment in question or the price at Seattle (R. p. 132).

Objection was made to the question and the witness testified over the objection that the price was "62½ cents a dozen." "That would be \$2.50 a case."

"Q. The quality of the salmon, generally; Pinks, what was the price of that?

A. 65 cents a dozen or \$2.60 a case.

Q. And the price of Medium Reds?

A. \$1.15 a dozen or \$4.60 per case." (R. p. 132.)

He testified that Kelley-Clarke had the marketing of this salmon and that he knew the number of cases in the consignment, which was approximately 10,498 cases of Chums, gross value at \$2.50 per case, \$26,245.00; 14,373 cases of Pinks, total value \$37,369.80; 4,786 cases of Medium Reds, valuation \$22,015.60. (R. p. 133.) He was then asked, "Was there any fluctuation in the market price of these goods between the 10th of January and the

A. No sir, I have not.

Q. That circular is issued under your name, is it?

A. Yes, they are our prices.

Q. That is the prices that you endeavor to obtain for the pack of the season of 1912.

A. Yes, sir." (R. pp. 136-137.)

He further testified that this price is fixed "right after the packing season is over, or nearly completed, say the latter part of August," and that the busiest months for moving the pack were probably October, November and December; that after December it was more difficult to move the pack at the opening market price, January, February and March being the dull months for moving salmon. (R. p. 137.)

He then testified that owing to abnormal conditions in 1911, the price of the 1911 pack had gone very high, "and consequently there was a great revulsion of feeling in 1912 and *we had to make prices commensurate with the conditions as we found them; in other words, we had to put them on a basis that would popularize the article.*" (R. p. 138.)

The witness also testified that Kelley-Clarke handled from eight to nine hundred thousand cases of Alaska salmon for this year (R. p. 132), being

the salmon belonging to a large number of packers; that in making sales they endeavored to apportion the orders among their various clients, having regard, of course, to brands and grades ordered (R. p. 139).

He further testified that the opening market price set in August remained "fairly firm until after the first of the year, and then, after the first of the year, drifting right down through the spring, it had a lower tendency in some of the commodities" (R. p. 140); that they had sold "very little" of the grade known as Chums in January, 1913; "very few" of the grade known as Pinks or the grade known as Medium Reds; that "business was very light" in February, 1913; that there was very few consignments of any of these grades in February; that in March there was "a little more increase of business, *as the market went down and met the ideas of the jobbers*, as spring progressed, the business increased" (R. p. 141).

At that time he could not state how much, if any, of the appellee's salmon was sold in January, February or March, and was requested to secure the information, which he did, and subsequently testified to. *He testified, positively, that he had not sold any part of the "Jeanie" shipment prior to*

its arrival (R. p. 142). Later he was asked when the first decline in the price of Chums took place, and answered:

“Well, the first evidence of it that I noticed in my records was in February, 57½, and then dropped to 55.

Q. About what time in February?

A. Oh, say the 10th or 15th.” (R. p. 145.)

Asked if there was any market for this salmon at the time it arrived at the opening market price, he answered: “Very little business at that time.”

“Q. Could you have disposed of this pack, consistently with the custom of your office, handling all of your customers at that time?

A. You mean this entire pack?

Q. Yes, sir.

A. No, sir, I could not.” (R. p. 145.)

He also testified that the dull state of the market at this particular time was “more than the usual state of affairs” (R. p. 145).

When the witness was later called, he had secured the information which he was unable to give on his former examination, and testified as follows:

That they had sold 8,500 cases of Chum salmon belonging to appellee during the months of January, February and March, 1913; that these were

sold sometime during the month of January or February shipment, and that this lot consisted of 4,000 cases of Spear brand, 1,500 cases of Trolling brand, and 3,000 cases of Antler brand. He also testified that these 8,500 cases were sold to the Pacific Commercial Company at Manila, and were shipped on February 8th. (R. p. 298.) He testified that on January 25th, he shipped out a balance of 1,500 cases of Pinks, on a contract and that the total Pinks sold between January 8th and March 21st "amounted in small shipments up to 4,234."

"Q. That includes the 1,500?

A. That includes the 1,500." (R. p. 300.)

He also stated that during this period from January 8th to March 21st, they sold "708 cases of Reds—in comparatively small amounts" (R. p. 300). These were sold at various times in small amounts and that the total of sales for appellee during this entire period of all salmon was 13,708 cases. He then gave in detail the brands of the different grades of salmon sold (R. p. 300). He stated that they did not sell any salmon for appellee which they were unable to deliver during that period (R. p. 301).

He was then asked as to what amount of

salmon of various brands belonging to appellee was in the warehouse at Seattle, on January 8, 1913, his answer being, 1,269 cases of Reds, Sea Lion brand; 117 unlabeled cases, same brand; 2,384 cases King Talls, unlabeled, same grade; 1,206 cases of Talls, Empire brand, same grade; 1,539 cases of Halves, unlabeled, same brand; also a total of 10,152 cases of Pinks of various brands, and 17,767 cases of Chums of various brands, giving the number of each brand in detail. (R. pp. 302-303.)

He then testified, positively, that he did not receive any orders for salmon of the grades included in the "Jeanie" shipment between January 8th and March 21st, which they were unable to fill; that they had sufficient salmon of all grades on hand to fill all orders, and then said: "*Shipment of these orders that I have told you that we had, we filled out of the 'Jeanie' cargo, because it happened to be convenient only.*"

"Q. Well, now, what do you mean by that?

A. Well, now, for instance, here we filled this Pacific Commercial Company *on Spear Chums and Trolling Chums*, we filled because we were in the process of overhauling at that time of the shipment, and we could use those instead of using stock that we already had in stock that we could have used. I used them, but I didn't have to use them."

“Q. You had plenty of other salmon of the same grade?

A. Yes.

Q. *Then, as a matter of fact, Mr. Small, did the Alaska Pacific Fisheries lose any market or lose any sale of salmon because of damage to the ‘Jeanie’ salmon?*

A. *I can’t say that they did, no sir.”* (R. pp. 304-305.)

He then stated that they used the “Jeanie” salmon instead of other salmon merely because it was convenient and had been freshly labeled and was in first class condition (R. p. 305), and that if they had “*used the other salmon they would have naturally inspected it to some extent before it went out*” (R. p. 305); that the expenses of such an inspection would be “Oh, trifling, three cents a case, maybe four cents a case. I have forgotten just what the price is” (R. p. 306).

He further testified that during this reconditioning period “we had a very ragged market and there were quite a good many goods.”

“Q. That was because of the condition of the market?

A. Yes. The market conditions were very unhappy during the spring of 1913.

Q. That had nothing to do with the damage of the Jeanie—

- A. (Interrupting) Not a particle; that had no bearing whatever.
- Q. It had no bearing upon the sale of the pack of the Alaska Pacific Fisheries?
- A. Not at all. The condition of the 'Jeanie' cargo, after it was properly overhauled, was in just as good condition as any salmon there was packed.
- Q. I mean the fact that this salmon was damaged did not affect the sale of the pack by the Alaska Pacific Fisheries?
- A. *No, sir; not at all.*
- Q. *And the delay in reconditioning the salmon did not affect the returns which they got from it?*
- A. *Not at all.*" (R. pp. 307-308.)

It would seem to us that the mere reading of this testimony, without argument or citation of authority, would be sufficient to show any court that this item of \$7,935.00 cannot be allowed. But, as the lower court allowed this large item of so-called damage, in face of this testimony, and as eminent counsel seem seriously to contend that such an allowance is justified, we will point out why we believe this is contrary both to law and justice.

From our earliest study of the law, we have understood that compensatory damages are never allowed unless a party proves that he has *actually suffered a loss*, and the burden of proof is on him. This is the first time we have known of a claim

being seriously made in a court for the recovery of thousands of dollars of damages, where the claimant expressly admitted and proved by his witnesses that he had not lost, nor been actually damaged a cent of the amount claimed. No authority was cited by appellee below, nor can any be found, to sustain such a claim, where punitive damages are not allowed.

On the other hand, the authorities are uniform that no damages are recoverable, either in tort or for breach of contract, except such loss as the injured party is able to establish by evidence he has actually sustained, and such as is capable of being reasonably ascertained and computed. This rule is well stated in the following authorities:

“Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable.”

Moore, *Carriers* (2nd Ed.), p. 623.

“Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages.”

Moore, *Carriers* (2nd Ed.), p. 624.

“Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are spec-

ulative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages."

Central Coal & Coke Co. vs. Hartman, 111 Fed. 96, at 98.

"A mining company, wrongfully enjoined from operating a mine, is not entitled to recover on the injunction bond profits lost, where it appears that, on account of other mines, operations were not suspended by the injunction, and that the particular mine would have been worked to an uncertain extent."

U. S. Mining Co. vs. McCornick et al., 185 Fed. 748.

"The general rule is too well settled to require more than the merest reference to authority that only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable."

Hollwig vs. Schaefer Brokerage Co., 197 Fed. 689, 701 (C. C. A. 6th Cir.).

“Where, in an action against a carrier for injuries to a steam shovel during transportation to the place where plaintiff intended to use the shovel in certain contract work, the only notice of special damages given to the carrier that would result from injury to the shovel beyond necessary repairs was from the delay which the carrier was notified would cause a loss of a contract penalty of \$50 a day, plaintiff not having suffered such penalty and the contract having been terminated for other reasons and the injuries to the shovel having been fully repaired, plaintiff was only entitled to recover nominal damages.”

Simons-Mayrant Co. vs. Atlantic Coast Line R. Co., 207 Fed. 387.

“The liability of a carrier to a shipper who has been charged and has paid the lawful published freight rates on interstate shipments, while lower rates resulting from rebates have been allowed other shippers over the same road, during the same period, and between the same termini, is not measured by the amount of the discrimination in the rates, but is limited to the pecuniary loss suffered and proved by the act of February 4, 1887, §8, which provides that a carrier doing any act prohibited by the statute shall be liable ‘to the person * * * injured thereby for the full amount of damages sustained in consequence of such violation, * * * together with a reasonable * * * attorney’s fee.’”

Penn. Ry. Co. vs. International Coal Mng. Co., 57 L. Ed. U. S. Sup. Ct., 1447.

The case of *Magdeburg Gen. Ins. Co. vs. Paulson*, 29 Fed. 530, is especially in point on this ques-

tion. There, a shipment of rice was damaged because of the unseaworthiness of the vessel. Libelant offered evidence to the effect that this damage was about 34% of the value of the rice. On the other hand, the ship showed that at very little expense the rice was reconditioned so that with the exception of a few bushels, it was in as good condition and sold for as much as though it had not been damaged. In that case, the Insurance Company had paid the owner the amount of his apparent loss and was subrogated to the rights of the owner, and sued for the amount it had paid, but the court refused to allow this claim, and allowed only the actual loss which resulted from the damage to the shipment.

“This universal and cardinal principle is, that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation, not to be compelled to pay more, except costs.

This principle is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry out this principle; and when in any instance they do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable, or turned aside by an exception.”

Sutherland on Damages, Vol. 1, pp. 17-18.

“The elementary limitation of recovery to a just indemnity for actual injury, estimated upon the natural and proximate consequences of the injurious act, fixes a logical boundary of redress in the form of compensation, and furnishes a general test by which any particulars may be included or rejected. Recovery beyond nominal damages requires that actual injury be shown.”

Sutherland on Damages, Vol. 1, p. 127.

In the case of *Gulf, etc., R. Co. vs. Godair*, 22 S. W. (Tex. App.) 777, suit was brought for damage to a shipment of cattle. The plaintiff kept the cattle until it was ascertained that the damage was less than appeared at first, but the court applied the rule of difference in value at time of arrival from their appearance then. The court said:

“That this is the general rule for measuring the damage in such cases is not questioned, but in this case there was evidence tending to show that the cattle, upon their arrival at Willow Springs, appeared to have sustained much greater injury than subsequently proved to have been the case; and, as appellee retained them until the real damage was ascertained, appellant contends that he should have been restricted to the actual loss he had sustained, and not allowed to recover the amount that erroneously appeared to have been received when the cattle first arrived, and we are of opinion that this is correct. We believe it has never been contended that a plaintiff can be restricted in the amount of his recovery to less than the real injury to his animal because the apparent in-

jury did not seem to be so serious when first inflicted, nor can it be successfully maintained that a defendant should be required to pay more than the real damage because the injury to the animal appears to be more serious at first than it subsequently proves to be. This, of course, does not apply to stock intended for market, and sold by the owner before the actual loss is ascertained. In such case the owner only receives the value of his animal, while still in its damaged condition, and the difference between this and what it would have been worth is the actual loss to him, and represents the damage he has in fact sustained. Compensation for the actual loss is the great desideratum in applying the measure of damage in each case to the particular facts therein developed, and no hidebound or technical rules should be allowed to thwart or obscure this purpose, when it can be avoided."

Under these universal and fundamental rules, and the testimony in this case, how can the court allow any damage for loss of market never sustained? Unless it is to punish appellant, and place appellee in a better position than it would have been in, if the cargo had been delivered in perfect condition?

Admit, for the sake of argument only, that the cargo was damaged through fault of the vessel, and what more can appellee claim than to be put in as good position as though no damage had occurred? But what is that position? Suppose the cargo had

been delivered in perfect condition, appellee would not and could not have sold, prior to March 20, 1913, a can more than it in fact sold. This was because there were no buyers at prices appellee was willing to accept, not because the salmon was not in condition for sale. Why should appellant, because unfortunately a small amount of damage was done to this large shipment, be compelled to guarantee to appellee the price *asked* for such salmon on the day of arrival, when it could not then be sold for that price, or any price appellee was willing to accept? If that is the law, then a shipper of goods is fortunate indeed if a small part of his goods is damaged through fault of the carrier. He is guaranteed the market price on the day of arrival in any event, together with the cost of restoring the goods to their former condition. If the price meanwhile goes down, he gets the former price and his expense; if it goes up, he gets his expense and makes the profit, and the longer he can delay the reconditioning of the last piece of his goods, the better chance he has of making a profit on a raise in price, with no chance of loss if the price goes down. But more than that, he gets the price at which a few goods like his could be sold when his arrived, although he could not or would not have sold his goods at that price.

Is this putting an injured party in the *same position* he would have been in if his goods had not been damaged, to guarantee him a sale he could not have made if his goods were not damaged at all, and at a price he could not have obtained? If appellee lost nothing by the delay, as its President and witness Small frankly admit, when the question was put squarely to them, why should appellant be compelled to pay them this large amount, nearly *twice* what it cost to restore the goods, according to their own claim? Why make appellant pay more than appellee lost, if it is required to pay anything? If it pays the actual loss has it not done all that law and justice require?

But the allowance made by the court goes further than even that. Both the Burekhardts stated many times that Mr. Small knew exactly what sales were made of appellee's salmon, and the prices received, as well as the market prices.

The court will remember that Mr. Small testified that there was no change in the prices of pink salmon between January 8th and March 20th, 1913; that the only change was in the price of *Chums and Medium Reds*. He also testified that the first drop in the price of Chums was about February 10th or 15th (R. p. 145), when they dropped from the open-

ing price of 62½ cents per dozen in the fall, which prevailed until then, down to 57½ cents per dozen. That later they went to 55 cents per dozen, which was the price he fixed for March 20th, and on which he based his figures, which were adopted by the lower court. (R. pp. 134, 492.) But he further testified, from his records of the sales made by him of appellee's salmon, that *during January* he actually sold 8,500 cases of appellee's *Chum* salmon to the Pacific Commercial Co. at Manila; and shipped them on February 8th, before the drop in the price of this quality (R. p. 298); and he also stated, positively, that 4,000 cases so sold were Spear brand and 1,500 were Trolling brand (R. p. 298). He further testified, positively, that these 5,500 cases were part of the "*Jeanie's*" cargo. (R. p. 304.)

The court, in adopting Mr. Small's testimony on this question, and his gross figures were the same as Mr. Burckhardt's, allowed a difference of 30 cents per case for the Chum grade. (R. pp. 132, 492.)

We therefore have this situation: 5,500 of these identical cases were actually sold by appellee in *January*, within a few weeks of their arrival, and shipped 40 days before work on the last of the entire shipment was finished, without a cent of loss, except the cost of reconditioning; and appellee

claimed below and claims here, and the court below allowed a loss of 30 cents per case, or \$1,650.00; on account of depreciation in market price of this particular lot, because weeks afterwards the price asked for this grade was 30 cents lower than when the shipment arrived and when this part was sold; and it allowed besides the cost of reconditioning this very lot.

These facts cannot be disputed. They are proven by this positive testimony of Mr. Small, from his actual records of the sale. While C. A. Burekhardt said he did not think any of the "Jeanie" salmon was sold during the reconditioning period, he admitted that if Mr. Small had so testified, it was true, as "Mr. Small would know." (R. p. 405.)

If this allowance is permitted to stand, appellee not only has *actually received the full price asked for this grade of salmon on January 8th*, but is also allowed the cost of reconditioning it, and \$1,650.00 besides for depreciation in market price *long after its actual sale*. In other words, appellee would actually receive for these 5,500 cases \$2.80 per case, besides the cost of reconditioning, although the highest price asked at any time was only \$2.50 per case.

Again, the court will remember Mr. Small's testimony that there was no drop in the price of *pink* salmon prior to March 20, 1913 (R. p. 134), the only drop being for *Chums* and *Medium Reds*; also his testimony that 10,498 cases of this shipment were Chums, 14,373 Pinks, and 4,786 Medium Reds. By comparing Exhibit "1" with Mr. Small's testimony (R. pp. 133, 301-303), it will be seen that this lot of 4,786 was made up of the 1,298 cases and 1,717 cases of Empire brand in the Yes Bay salmon, 1,583 cases and 90 cases unlabeled and 98 cases Empire of the Chilkoot salmon. Of this lot only 498 cases suffered any damage whatever (Exhibit "1"). When the "Jeanie" salmon arrived, appellee already had on hand at Seattle, unsold, 1,269 cases of Medium Reds, Sea Lion brand, and 1,206 cases of Talls and 1,539 cases Halves, Empire brand (R. pp. 302-303), and between January 8th and March 20th, appellee was able to sell only 708 cases in all of Medium Red salmon, and in small quantities only. (R. p. 300.)

In face of these facts, that only 708 cases could be sold at all, that appellee had on hand unsold, but ready to fill orders, 2,475 cases tall cans and 1,539 half cans of this grade, and received from the "Jeanie" 4,288 cases of the same brand wholly undamaged, the lower court accepted Mr. Small's fig-

ures and allowed as damage from depreciation in market price of Medium Red salmon in this shipment *one dollar per case on the entire shipment.* (R. pp. 132, 134.)

Turning again to the Chums, we find there were 10,498 cases of this grade in this shipment (R. p. 133), composed as follows: Of Yes Bay salmon, 469 Trolling, 1,052 Spear, of Chilkoot, 2,433 Trolling, 2,916 Spear, 609 Trolling, 619 Spear and 2,400 Spear. (Exhibit "1," R. p. 303). Of this lot only 1,610 cases were damaged at all. (Exhibit "1.")

As we have shown, 5,500 cases of these Chum salmon on the "Jeanie," or more than half of the lot, were actually sold in January at the price asked on January 8th. At the same time appellee had on hand at Seattle, unsold but awaiting sale, 17,767 cases of Chums, 5,298 being Trolling, 5,272 being Spear and 4,992 Antler. (R. p. 303.) But the only Chum salmon sold by appellee between January 8th and March 21st were the 5,500 cases of the "Jeanie" Trolling and Spear brands, and 3,000 of the Antler brand, which were on hand January 8th. (R. p. 298.)

In the face of this testimony, the trial court accepted Mr. Small's figures and allowed 30 cents depreciation in market price for every case of this

Chum salmon on the "Jeanie," a total of \$3,149.00. The total allowance being the \$4,786.00 for Reds, and \$3,149.00 for Chums; total \$7,935.

Further, this allowance was made in spite of the fact that of the 4,088 cases damaged out of the entire shipment, 1,980 cases were Pinks (4,088 less 2,108 Chums and Reds), which did not depreciate in market price at all (R. p. 134); *and the allowance was made for the time it took to recondition the Pinks as well as the other kinds.* We fail to see on what theory, in any event, appellant can be allowed for depreciation in market price of Chums and Reds, during the time the Pinks, which did not decline, were being reconditioned.

But why should any allowance be made for loss of market price? The only answer is that given by Mr. Burckhardt, that he was advised that was the legal measure of damage. (R. pp. 407-408.) Not that the damage was sustained; not that appellee lost any of this large amount because of any act or fault of the vessel or danger to the salmon, *or at all, for that matter*; but simply because that is the rule.

But we believe both counsel for appellee and the trial court are in error both as to the rule and its application. The rule contended for by appellee, and applied by the lower court, to-wit, the

difference in market price between the time when a shipment should arrive and when it actually arrives, has no application in a case like this; and no case was cited by appellee below where this rule was applied in such a case. No delay in arrival was claimed in this case.

The ordinary rule for measuring damages where goods arrived *damaged, not delayed*, is the difference between the sound market value and the damaged market value at the time and place of arrival.

Moore on Carriers (2nd Ed.).

Hutchinson on Carriers, (3rd Ed.).

The Berengere, 155 Fed. 439.

But in this case there is no evidence of any such difference between sound and damaged value, nor was the allowance claimed or made as such.

Neither does either rule of difference in price apply in such a case as this. The salmon in question was not shipped to Seattle to fill an order, nor for sale, except as demands for it might be made, but were not, in fact, made. It was shipped solely *to be stored until it could be sold*. It is only where goods are shipped for sale that this rule applies.

Hutchinson on Carriers (3rd Ed.), Secs. 1366, 1373.

Elliott on Railways, Sec. 1730.

The measure of damage applied where goods are not intended for sale, is the value of their use.

Moore on Carriers (2nd Ed.), Vol. 2, pp. 606, 608.

Hutchinson on Carriers (3rd Ed.), Sec. 1373.

But even this measure does not apply here, because appellee lost no use of this salmon. Therefore, the only rule to apply in this case is one fitted to the facts, to-wit: Put appellee in the same position it would have been in if no damage had been done, if appellant is liable for anything at all. This is justice, and is sound law. It is the fundamental rule, of which the others are merely particular applications, applicable to other conditions, but not here.

In this case, applying this sound, equitable and fundamental rule, what should be allowed, if anything, under this evidence? Certainly, nothing for any loss on account of failure of appellee to obtain the prices of January 8th, which could never have obtained more than it, in fact, obtained, and it did not sustain such a loss through any damage to the salmon, as it frankly admits. The amount which it necessarily paid to put the cargo in the condition it should have been in on arrival, if the vessel had not been at fault, if it was, answers this rule com-

pletely, and this was all appellee ever asked for before this suit was commenced.

Then, for the first time appellee made other claims of damage, which from time to time it changed and abandoned, admitting finally that all of these other claims except the large one under consideration, and Mr. Horner's bill, were wholly untrue or unfounded; and even admitting that it did not sustain a cent of loss on account of depreciation of market price. But it still clings to this claim, and every cent thereof, even in face of the undisputed fact that it actually received at least \$1,650.00 of this amount, and never could have obtained more. Its excuse for this claim is that, by applying a rule of law to a state of facts to which it was never intended to be applied, and never has been applied before, it could get something for nothing. And to support its contention, authorities were cited below, where the rule has been applied in cases in which the proof showed the loss claimed was actually sustained, and this measure of damage was properly applied. Before discussing these authorities, we wish to discuss our second ground of objection to this item, *i. e.*, that the evidence fails to show any market or market price for this salmon, within the established rule.

“In order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor, and an ability from such demand to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing, and no ability to sell the same, then it cannot be said to have a market value.”

8 Ruling Case Law, 487-488.

The definition of the term “market value” is well stated as follows:

“The ‘market value’ of a commodity, in its last analysis, means the price which it will bring in cash from a buyer who is willing to pay its value.”

Parish & Co. vs. Yazoo R. Co., 60 So. 322.

It would not seem to be necessary to cite authority that there can be no market for an article of commerce, nor a “market value” therefor, unless there are persons willing to purchase the article at the price the owner is willing to sell for. A market cannot be made by either seller or purchaser alone, nor can the market price of an article be determined alone by what the owner is willing to take or a buyer is willing to give.

Again, the market price of a large shipment of goods is not to be determined by what a small portion of the goods could be sold for. If the rule is to apply at all, it must be the market price of the

entire shipment, not the market price of a few cans or cases out of the shipment.

In this case, the only evidence of market price of salmon in any way competent is the testimony of Mr. Small, who was asked the general question as to the market price of salmon of these brands at the time in question. The rule requires the market price to be shown at the place of destination of the goods; and there is no showing of that fact, unless the court takes the evidence of Mr. Small, that because of the implied, at least, combination between all the packers of salmon on this coast in fixing a price at which they would sell that year's salmon pack, this fixed the price at Seattle as well as everywhere else where this salmon was being held.

But aside from this question, Mr. Small testified in particular how the price of salmon was fixed. He stated that the Alaska Packers' Association of San Francisco, the largest packer of salmon on this coast, after considering the probable extent of the season's pack, and the demand therefor and general business conditions, sent out a circular fixing the price at which it would sell its salmon of various brands and grades, and that the little dealers, which included those represented by Kelley-Clarke, who handled all of appellee's pack, were forced to sell

their salmon at this price. Whether or not there was an express agreement between all of these dealers in fixing this price, at least there was such a common understanding among them as to amount to an agreement to arbitrarily fix the price at which they would sell the only available canned salmon in these markets. They maintained this price and compelled persons desiring to purchase salmon on this coast to pay the same or go without, until about the middle of February, 1913, when the owners of salmon, being unable to dispose of their pack at these prices, and in order to induce purchasers to take it off their hands before the next season's pack came in, commenced to reduce their price; but even then they were unable to dispose of the pack until they had put their price down to such a figure as purchasers were willing to pay.

At the time of the arrival of this salmon and during the entire period it was being reconditioned, there were no purchasers who were willing to pay the prices asked for these grades of salmon, except for small quantities thereof. It was absolutely impossible for appellee to have sold this entire cargo, or any considerable portion of it, at any of the prices named by Mr. Small, as the market price during the period of reconditioning. True, small

quantities of the salmon were disposed of during this period, but that does not fix a market price *for the cargo*.

Certainly, a carrier cannot be compelled to pay, as the market price of a large shipment of goods injured or lost, what a small portion of such articles could be retailed for; and when Mr. Small testified to the price per dozen or per case of these grades of salmon, and then an attempt is made to apply this price to this shipment of nearly 30,000 cases as the market value thereof, it is going far beyond any proper application of the rule.

On these questions, we wish to call the court's attention to the following authorities:

In the case of *Kountz vs. Kirkpatrick*, 72 Pa. St., 376, the court discussed the testimony as to the market value of oil. It appeared in that case that dealers in oil had bought up large stocks of available oil for the purpose of holding up the price, and fixed an arbitrary price at which they were willing to sell. The court quoted the following definition of "market price:"

"To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices

upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The court then discussed the evidence in that case of the fixing of the price at which holders of oil were willing to sell, and held that this evidence did not show a market price.

In the case of *Lovejoy vs. Michels*, 49 N. W. (Mich.) 901, recovery of the reasonable value of goods was sought; the evidence of value was the price fixed by a combination of dealers to fix prices of these goods. The court said:

"The trial judge heard and submitted the case upon the theory that a combination to fix prices was not unlawful if the purpose was to

fix reasonable prices, and when defendant sought to show that the prices fixed were not fair market prices, and were above the market value, the court refused to permit him, and restricted him to the market price, when, as a matter of fact, the association embraced all the manufacturers, and the only 'market price' was that fixed by the association. In *Richardson vs. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102, this court held that any combination to control prices was unlawful, as against public policy. In the present case, as in that, it was claimed that the combination had in fact reduced prices, and upon that point the court say: 'It is no answer to say that this monopoly has in fact reduced prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an exorbitant degree.' In the present case no price was agreed upon at the time the order was given, and there was no evidence tending to show that defendant had any knowledge of the price fixed by the association. An attempt is made to fasten a price fixed by a combination upon such a purchaser. It is sufficient to know that the price sought to be imposed is that fixed by the combination. If so, it was unlawfully fixed, and has no force as a market price, for that reason. It is the combination for the purpose of controlling prices that is unlawful, and the fact that they, the manufacturers, deemed the prices fixed to be reasonable, does not purge it of its unlawful character. Independently of the unlawful character of the combination fixing it, a price so fixed cannot be regarded as any better evidence of value than that fixed by any vendor upon his own wares. A price so fixed is not to

be entitled to rank as the market price. It is not a market price, within the contemplation of the law. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition. It cannot be divested of these incidents, and retain its character. Associations of this character give the buyer no voice, and close the market against competition."

In the case of *C. R. I. & P. R. Co. vs. Broe*, 86 Pac. (Okl.) 441, the court discussed the term "market value" as used in a statute fixing the measure of damages for delay in shipments of merchandise. The shipments under consideration there were large quantities of nails and wire, but the only evidence of market value was what the nails and wire would sell for per pound. The court said:

"The evidence on this point did not conform to the rule for determining such value. The market value, as applied to the case at bar, in contemplation of law, would have been what the different articles of merchandise would have sold for in bulk in the open market at Lawton on the different dates. The law does not contemplate that the carrier shall be liable for the value of merchandise if sold at retail. Such a rule would make the carrier liable, not for the market value of goods as sold in car load lots or in quantities as carried by it, but would also add to and include the profits of the sales at retail, without taking into consideration the costs incident to such sales. There was no evi-

dence before the jury by which it could determine the difference in the value of the articles in question when sold in bulk and when at retail. The case was tried upon the theory that the retail market should control. The court gave the jury no instructions as to this matter, and in the light of the entire record we must conclude that the jury understood that by 'market value' was meant the value which such articles sold for in the retail trade. The damages were estimated by an improper standard."

"No element of loss can be considered in the computation of damages, that is not clearly and unqualifiedly proved. * * * So, where there is no market price for an article, damages cannot be computed upon the belief of plaintiff, or other witnesses, more or less probable, that the commodity contracted for, and not delivered, could have been sold for a certain price."

Iron City Tool Works vs. Welisch, 128 Fed. 693 (C. C. A. 3rd).

"If the goods have no market value, the measure of damages (for injury to goods) is usually the cost of reproducing and replacing the articles, if this can be done;"

Elliott on Rys., Sec. 1734 (2nd Ed.).

In the case of *Western Union Tel. Co. vs. Hall*, 124 U. S. 444, damages were claimed on account of failure of the telegraph company to deliver a message authorizing the purchase of oil. Before delivery, the price went up. No order had been given to sell any oil, and the court held that as plaintiff

had suffered no actual loss, except the cost of the telegram, that cost was all he could recover.

The cases relied on by appellee in the court below, and which it will probably rely on here, are not in point, under the evidence in this case.

In the case of *Western Mfg. Co. vs. The Guiding Star*, 37 Fed. 641, the damaged butterine was actually sold in its damaged condition, the loss, of course, being the difference between the sound value and the damaged value.

In the case of *The Berengere*, 155 Fed. 439, Judge Wolverton expressly stated that difference in market value is the measure of damage only where there has been delay; but he said:

“The rule, however, is otherwise where there has been no delay, and the cargo is damaged through fault of the carrier. In such case the measure of damages is the difference between the value of the goods in their damaged state and their value at the port of destination, had they been delivered in good order.”

The case of *The Alexander Gibson vs. Portland Shipping Co.*, 56 Fed. 603, cited by Judge Wolverton and referred to in libellant's brief, was not decided on the point in question.

In the case of *United States S. S. Co. vs. Haskins*, 181 Fed. 962, the damaged coffee had a market

value and it was actually sold at a loss. The court held that the loss of market value was the correct measure of value.

In the case of *Page vs. Munro*, Fed. Cas. No. 665, the court held that there must be proof of damage from unreasonable delay, or none could be allowed. The court merely stated the general rule as to the measure of damages to be "that the carrier who unreasonably delays to deliver merchandise, such as is ordinarily bought and sold in the market, is responsible for the fall in price."

In *The Success*, Fed. Cas. No. 13,586, no exception was taken to the assessment of damages, the commissioner finding there had been a loss of market value.

In *The Golden Rule*, 9 Fed. 334, the court merely states the general rule, which had no application in that case, as there was no evidence of difference in value.

In *The Giulio*, 34 Fed. 909, the court held that the ship was liable for loss of market price during delay, if any should be proven.

In the case of *The Caledonia*, 43 Fed. 681, the decision was based on the fact that the shipper knew the cattle "were to be sold at the first possible mar-

ket day after arrival," citing *W. U. Tel. Co. vs. Hall*, 124 U. S. 444.

In the case of *The Caledonia*, 157 U. S. 124, the Supreme Court applied the rule of loss of market price because "it is found as a fact that these parties knew and contemplated that the cattle were not to be sold before arrival, but were to be sold at the first possible market day after arrival."

It would seem to us there can be no question that all of this allowance for so-called depreciation in market price must be disallowed.

MR. HORNER'S BILL.

Even if the court should hold the ship liable for any damage to this cargo, we believe that it cannot allow the full amount of Mr. Horner's bill.

When the salmon was unloaded, all cases showing damage were set one side. These amounted to about 2,100 cases out of the total. Most of these cases came from the forward part of the ship. This was the portion that Vice-President Burckhardt saw wet on the ship (R. p. 92), although he also claimed to have stood on the deck and looking down into the after-hold saw some wet, dirty cases there. (R. p. 93.) He did not see any damaged salmon in any other part of the ship. (R. p. 94.) Mr. C. A.

Burckhardt did not see the cases in the forward part of the ship, but saw some dirty cases in the after-hatch, and some wet cases in this hatch near the skin of the ship. (R. p. 166.) Horner saw a few wet cases taken from the square of the main hatch. (R. p. 194.) Mr. West made a thorough investigation of the cargo in the forward part of the vessel, where all, or at least most, of the water damage was. (R. pp. 330, etc.) Mate Gunther also found the water damage to be in the forward and lower part of the ship. (R. p. 356.) After this cargo, which appeared to be damaged, was set aside, a meeting between representatives of appellee, the ship, its insurer and Mr. Horner was held and Mr. Horner was authorized to recondition this damaged salmon, but without admitting liability on the part of the ship. He says he understood he was to overhaul the entire cargo, but certainly there was no such understanding on the part of any one else, and no agreement to that effect was made by the owner or charterers of the ship, or their insurer. However, Horner claimed to have found other cargo which had been passed as undamaged, but which on further investigation showed damage, some from water, but mostly from coal dust. He, therefore, proceeded to overhaul the entire cargo, and recondition all that needed it, putting it in at least as

good, if not better, condition than it was in before. Horner's bill for work which he did on this cargo (Libelant's Exhibit "A") amounts to \$4,283.06, and was paid by libelant. This bill includes a number of different items of charges, which we will consider separately, and in doing so will call particular attention to the discrepancies between this bill and Claimant's Exhibit "1." This exhibit is a statement made by Mr. Horner's foreman "of the condition of the number of cases and the brands purporting to be overhauled on that boat. Here is the brand. Here is what was done, on the work, showing how many cases cleaned and lacquered, cleaned, lacquered and relabeled." "Here is the record he kept of it. Here is a list he took off his book as he cleaned up each lot and I took a record of it. Q. That is correct, is it? A. Yes, sir. Q. How many cases does that show which sustained any damage whatever? A. There is about 4,088 cases." (Testimony of Horner, R. p. 221.)

Here, then, is a statement, made by the only person who knew how many cases were damaged and reconditioned, sworn to as being correct by appellee's witness, and not controverted. The bill, on the other hand, does not purport to be a statement made by any one, nor from any records, of the

damage or repairs to this particular cargo. Certainly, appellee is bound by this statement wherever it differs from the bill.

The first item of the bill is a charge for overhauling 29,657 cases. This was the entire shipment, but Exhibit "1" shows that the cargo was 13 cases short on delivery; therefore, this is admittedly an overcharge of 6 cents per case on 13 cases. Mr. Horner so stated. (R. p. 222.) Exhibit "1" also shows 58 cases of swells which had to be thrown out, not overhauled because of any damage on the ship. While these are small matters, they nevertheless cast suspicion upon the entire bill and claim.

Further, this charge of 6 cents per case, amounting to \$1,779.42, was for opening up every case in the shipment, although only 4,088 cases in all were found damaged in any respect. (Exhibit "1," Tes. of Horner, R. p. 223.) Horner stated that they "would go along sometimes fifty or seventy-five or a hundred cases and not find any" damage (R. p. 223); also that after he had made the examination and reconditioned the cargo, he guaranteed the condition to be good, and would pay any claim for damaged goods. (R. p. 230.) He also testified that he made a business of overhauling and, where necessary, reconditioning salmon cargoes from Alaska.

This work, with Horner liable for any claim for damaged goods, was certainly of value to appellee; but it seeks in this case to make the ship pay for this work and guarantee, on over 25,500 cases which were not damaged at all, merely because a small part of the cargo was damaged, and there was a mere possibility that the balance might be, but was not.

Again, this bill contains a charge of \$426.13 for lacquering and relabeling 3,964 of these same cases at $10\frac{3}{4}$ cents per case, and of \$16.20 for lacquering 124 cases at 5 cents per case; also a charge of \$1,022 for cleaning 4,088 of these cases, at 25 cents per case. These were all the same cases. (Tes. of Horner, R. p. 221.) Appellee, therefore, attempts to make appellant pay 6 cents per case for overhauling these 4,088 cases, 25 cents per case for cleaning them, $10\frac{3}{4}$ cents per case for lacquering and relabeling all but 124 of them, and 5 cents per case for lacquering the balance, or $41\frac{3}{4}$ cents per case on nearly all of the damaged salmon, besides all the other charges. We fail to see why the ship should be required to pay, in any event, an overhaul charge of 6 cents per case on cases which were damaged and had to be reconditioned; nor why it should have to pay this overhaul charge on the undamaged salmon, which gave

appellant the benefit of Horner's guaranty, and which, according to Mr. Small, would have had to be overhauled any how at an expense of 3 or 4 cents. (R. p. 306.)

The next two items of the bill are \$426.13 for lacquering and relabeling 3,964 cases of this salmon at $10\frac{3}{4}$ cents per case, and \$6.20 for merely lacquering 124 cases at 5 cents per case. But Exhibit "1" shows that *only 1,799 cases* out of this entire shipment were lacquered and relabeled, while *2,299 cases* were merely lacquered. Therefore, at most, the ship could not be held for more on these items than $10\frac{3}{4}$ cents per case on the 1,799 cases and 5 cents per case on the 2,289 cases, or a total of \$308.84, instead of \$432.33.

But if the court should find, as we have contended, that the ship was not in any event liable for damages to the Chilkoot salmon, a further reduction on all of these items would have to be made, for the 1,493 cases of this salmon cleaned, lacquered and relabeled and the 187 cases only cleaned and lacquered. This would also apply to all the other items of this bill. We would also again call attention to the fact that the larger part of the cans requiring relabeling were from the Chilkoot salmon, which sustained the greater water damage; the other

shipments required only cleaning and lacquering, without relabeling, showing the damage to them was mostly from coal dust which was dry and could be wiped off the labels without relabeling.

The bill also contains a charge of \$291.50 for 2,650 new cases at 11 cents per case. This includes some new cases for broken ones (Tes. of C. A. Burckhardt, R. p. 155), for which no claim is made and for which the ship was not liable. But even if all of these new cases could be charged to the ship, there would be only the difference between 4,088 cases damaged and 2,650 new cases, or 1,438 cases partially damaged, so as to require one or more new parts. But the bill contains a charge of \$178.50 for 5,950 new tops at 3 cents each, when only 1,438 could have been damaged by the ship, costing only \$43.14, an overcharge of \$135.36 as against appellant.

There is also a charge for 198,200 labels at 80 cents per thousand, but only 1,799 cases of 48 cans each of this cargo were relabeled, requiring only 86,352 labels, costing only \$69.08, or an overcharge of \$89.48, as against appellant.

It will thus be seen that under no possible theory of this case can appellee recover the full amount of this bill. If it paid a bill which was improper, that

fact does not bind the ship. However, we think it fairly appears, and the court will find from all the evidence in this case, that this bill, if it covers only work done and material furnished for this cargo, includes work and material done and furnished in putting this shipment in first-class condition by repairs made necessary, to a very large extent, by other causes than damage sustained on the ship. In any event, the burden was on the appellee to prove its actual damage. The bill does not prove this, and Exhibit "1" and Mr. Horner's testimony as a witness for appellee, being the only witness offered on this question, prove conclusively that all of the expense included in this bill was not made necessary by any damage to the cargo while on the vessel.

We contend, therefore, that even if the ship be held liable for the necessary expense of overhauling and reconditioning this cargo, on account of both water and coal dust damage, the amount of Mr. Horner's bill must be reduced by the following amounts, at least:

3 cents per case account overhaul charge.....	\$ 889.71
Account overcharge for relabeling.....	123.49
Account overcharge for new tops.....	135.36
Account overcharge for labels.....	89.48
	<hr/>
	\$1,238.04

and that the most that can be allowed appellee in this case is \$3,045.02.

The court allowed interest on the cost of reconditioning, amounting to \$578.20. If the allowance of damages is reduced, this item of interest must be also reduced accordingly.

We confidently believe, however, that if the court will carefully consider the evidence as to what was done to make the "Jeanie" seaworthy, it will be satisfied that no liability whatever exists in this case, and the libel should be dismissed. If it nevertheless believes that liability exists for some of the damage to the cargo, it will limit the recovery to only the damage from coal dust, which, under the evidence, would be no more than 15% of the total recoverable damage. That in no possible event will it permit the recovery for loss of market price to any extent, much less for the \$1,650.00 already received from the sale of the 5,500 cases of Chums in January. And that the allowance, if any, for reconditioning charges will be based upon the actual cost thereof, due to the damage caused by the ship, as appears from Mr. Horner's testimony, and not the bill which his evidence shows conclusively was not all necessary on account of this damage.

The case having been considered and decided upon the testimony taken out of court, this court is in as good position to decide the matters as was the lower court. This court, therefore, will not feel bound by any findings of the lower court, but will consider the whole case as a trial *de novo* upon the merits on the record.

Respectfully submitted,

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellant.

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No. 2647

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY,

Appellant,

vs.

ALASKA PACIFIC FISHERIES,

Appellee,

BRIEF FOR APPELLEE

C. H. HANFORD,

KERR & McCORD,

Proctors for Appellee.

Filed this.....day of October, 1915.

.....
Clerk.

By.....
Deputy Clerk.

No. 2647

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY,

Appellant,

vs.

ALASKA PACIFIC FISHERIES,

Appellee,

BRIEF FOR APPELLEE

STATEMENT.

This is a suit *in rem*, against the steamship Jeannie, employed as a common carrier in interstate commerce, to recover damages for a maritime tort. The pleadings to be considered consist of the Libel, Amended Answer and Second Amended Libel, which supersedes the original and First Amended Libel and to which there is subjoined a reply to affirmative matter pleaded in the Amended Answer.

The case being a suit in admiralty brought in a United States District Court founded upon transactions in interstate commerce, the Libelant is not re-

quired to allege or prove a right to maintain it by virtue of compliance with the requirements of State statutes as to payment of annual fees or other prescribed conditions.

Norfolk v. W. R. Co., 136 U. S. 114; 10 Sup. Ct. 958;

Sioux Remedy Co. v. Cope, 235 U. S. 197; 59 L. Ed. Ad. 1914, p. 57;

Clyde Steamship Co. v. City Council, 76 Fed. Rep. 46;

The Fred E. Sander, 208 Fed. Rep. 724.

The Libelant is a corporation organized and existing under and by virtue of the laws of the State of Oregon. (Stipulation, Record p. 192.)

The Amended Answer admits that at the times of the transactions alleged in the Libel, the steamship Jeannie was a common carrier of freight between ports in the State of Washington and ports of Alaska; and that at the time of the commencement of this suit she was within the district and jurisdiction of the District Court in which it was commenced.

A bond for release of said steamship was given and now constitutes the *res*, in place of the vessel.

The Facts of the Case are as follows:

1. In the year 1912 the Libelant owned and operated salmon canneries at Chilcoot, at Yes Bay and at Chholmley in Alaska and owned the several consignments of canned salmon hereinafter referred to.

2. In the months of December, 1912, and Janu-

ary, 1913, the Jeannie made a voyage from Seattle to Alaska and return, carrying on her northbound trip a cargo of coal in bulk and other merchandise, which coal was discharged from the ship, partly at Juneau, before any cargo for the return trip was taken on board and the remainder thereof at Sitka and at Ketchikan after passing Chilcoot. (Testimony of Capt. Karbbe, pp. 243, 260-261-2, 270.)

3. While northbound and before any coal had been discharged the Jeannie was detained several hours in Wrangell Narrows, where she was anchored in shoal water and although, loaded as she was, the draught of said vessel was 20.6 feet, the ebbing of the tide left a depth of water surrounding her of only twelve feet and she sank into the muddy bottom approximately four feet; but with the return tide she floated and proceeded to Juneau; and from thence continued on her voyage. (Testimony of Capt. Karbbe, pp. 246-7, 260-266.)

4. After passing Chilcoot an attempt was made to take the Jeannie from Gypsum to Sulzer via the open ocean route, tempestuous weather was encountered and, being unable to make headway, that intended trip was abandoned and the ship proceeded to Sitka and from thence to Ketchikan. In the heavy weather referred to in this paragraph the ship's decks were washed by waves breaking over her, she rolled and her officers presumed that she may have been strained, but the only injury reported was the loosening of one plank of her floor on the bottom of her hold, which was found afloat with

bilge water swashing through the opening of the floor, and said plank was replaced. (Testimony of Karbbe, pp. 250-1-2-3; testimony of Gunther, pp. 349-350, 364-5.)

5. From Ketchikan the Jeannie went to Yes Bay and to Chholmley, returned to Ketchikan and from there, on the 3rd day of January, proceeded on her homeward voyage, arriving at Seattle on the 8th day of January, 1913, being delayed by very heavy weather, gales and snow storms, which were nearly continuous but caused no injury to the ship, unless by straining in a way to open the seams of her deck. (Testimony of Karbbe, pp. 254-5.)

6. The Jeannie is a wooden vessel, she leaked previous to and during said voyage but not to excess beyond the capacity of her pumps to prevent any considerable accumulation of water in her hold. (Testimony of Karbbe, pp. 245-254.)

7. On the routes traversed by the Jeannie on said voyage, gales and rough weather are frequent and to be expected in the winter season. (Testimony of Karbbe, pp. 288, 277.)

8. During said voyage the Jeannie was under a time charter and was operated by W. F. Swan acting as manager for the charterers.

9. There was no survey or inspection of the Jeannie, to ascertain her condition as to seaworthiness, by her owner, charterers or any person acting for either of them, between the time of her arrival at Seattle on her return from her last preceding voyage and her departure from Seattle on said voy-

age in December, 1912; nor at either of the ports in Alaska called at during said voyage. (Testimony of Karbbe, p. 271; testimony of Swan, p. 324; testimony of Dawson, pp. 311-12.)

10. Before starting on said voyage, the master of the Jeannie requested her owner to furnish new tarpaulins needed for hatch covers, but they were not furnished. (Testimony of Roberts, p. 112-113.)

11. On said voyage the Jeannie received and took on board from the Libelant's cannery at Chilcoot 10,747 cases of canned salmon, and from Libelant's cannery at Yes Bay 13,972 other cases of canned salmon, and from Libelant's cannery at Chholmley 4,737 other cases of canned salmon, in the aggregate 29,657 cases for transportation to Seattle.

12. All of said cases and the contents thereof when received and taken on board of the Jeannie were in perfect good order and condition for shipment. (Testimony of F. O. Burekhart, pp. 80-81-90; Heckman, pp. 102; C. A. Burekhart, pp. 152; Horner, pp. 201-2-3-4-5.)

13. On arrival of the Jeannie at Seattle terminating said voyage said cargo of salmon, as an entirety was in a damaged condition; many of the cases and the cans therein were soiled by coal dust which had sifted through the cargo and into the cases of the salmon and many of the cases and cans therein were wet by sea water and bilge water; more than 4,000 cases were actually damaged by coal dust or water or both and every one of the 29,657 cases had to be and were opened and repacked for the

reason that many of the cases which were dry and clean on the outside thereof contained cans which were damaged by coal dust and dampness. (Testimony of F. O. Burekhart, p. 83-84-85; C. A. Burekhart, p. 155; Heckman, pp. 104-5; Roberts, pp.; Horner, pp. 198-9; Isted, pp. 119-120; West, p. 330; Gunther, p. 356.)

14. At the time of said voyage the owner of the Jeannie carried indemnity insurance against liabilities of the ship for damages to merchandise carried by her; and said charterer and an agent of the insurer were immediately after the termination of said voyage by arrival of the ship at Seattle informed of the damage to said canned salmon while in transit, and both had actual knowledge thereof and the nature and extent of said damage and of the action taken to overhaul said canned salmon and restore the same to marketable condition. (Testimony of West, pp. 326-336; Dawson, pp. 314-315-318.)

15. When the Jeannie's hatches were uncovered it was apparent that sea water in large quantities had been admitted into the interior of the ship where said cargo was stowed, through the hatches and through the ship's deck, and said space was wet and dirty and the tarpaulins used for hatch covers were old, worn, perforated and rotten. (Testimony of C. A. Burekhart, pp. 154; Roberts, p. 117; F. O. Burekhart, p. 85.)

16. With business like promptness and approval of the libellant, said charterer and the indemnity in-

surer of the Jeannie's owner, a competent contractor for such work commenced and carried through to completion, the necessary work of overhauling, reconditioning, relabeling, and repacking said canned salmon; and did restore the same to marketable condition; which work was finished on the 20th day of March, 1913, at an expense of \$4,283.06, which amount was the actual and reasonable charge of said contractor. (Testimnoy of C. A. Burckhart, pp. 156-7, 396; Dawson, pp. 316; West, pp. 329; Horner, 196-7-200-201-202.) Libelant's Exhibit A.

17. The charterer and the insurer both refused to pay said contractor's bill; and in order to obtain possession of said canned salmon the libelant was obliged to pay it, and did pay it, on the 8th day of April, 1913. Testimony of C. A. Burckhart, p. 175; Horner, p. 202.)

18. The libelant paid in full the freight charges for transportation of said canned salmon from the canneries at Seattle. (Testimony of C. A. Burckhart, p. 153.)

19. The libelant incurred expense and paid for storage of said canned salmon during the time required for reconditioning the same \$778.47 and for insurance during the same time \$150.54. (Testimony of C. A. Burckhart, p. 162.)

20. The value of said 29,657 cases of canned salmon on the 10th day of January, 1913, at the then market price at Seattle, if the same had been in the same good condition as when taken on board the

Jeannie, would have been \$85,630.40. (Testimony of C. A. Burckhart, p. 159; Small, pp. 132-3-4.)

21. During the time required for reconditioning said salmon there was a decline in the market price so that on the 20th day of March, 1913, the value thereof was \$77,695.00. The difference in market price values between the two dates being \$7,935.00. (Testimony of C. A. Burckhart, p. 160; Small, p. 134.)

22. The only contract for the transportation of said canned salmon is implied from a verbal request by the libelant to the Jeannie's owner, *pro hac vice*, that is the charterer to have the ship bring said merchandise from the canneries to Seattle, and the undertaking of that service by receiving said merchandise on board of the ship for carriage, and the payment of freight. (Testimony of Swan, pp. 320-321.)

23. No compensation has been rendered to the libelant for the loss sustained by the damage to said merchandise while in transit on board of the Jeannie.

24. On the 7th day of April, 1913, the Libelant was about to commence a suit *in rem*, against the Jeannie to recover damages for the loss aforesaid; and, on that day, in consideration of forbearance an agreement in writing was executed by the Claimant and delivered to and accepted by the Libelant in words and figures as follows: to-wit:

AGREEMENT

THIS AGREEMENT, made this 7th day of April, 1913, in the City of Seattle, between the ALASKA COAST CO. for themselves and on behalf of W. F. Swan, party of the first part, and ALASKA PACIFIC FISHERIES, party of the second part, WITNESSETH:

THAT, WHEREAS, the Steamer "JEANNIE," owned by the Alaska Coast Co. and under charter to W. F. Swan, party of the first part, did on the 21st day of December, sail from the port of Chilkoot, Alaska, bound on a voyage to Seattle, Washington, via various ports of call, and on the voyage South took on a cargo of salmon at the various ports of call, and on January 8, 1913, arrived at Seattle, and on subsequent dates it was found that the cargo of salmon had been more or less damaged on the voyage South, and

WHEREAS, It is the desire of the party of the first part, and party of the second part, owner of the salmon, to this agreement, to avoid all unnecessary expenses in connection with any litigation and determination of liability for the loss of or damage to said salmon;

NOW, THEREFORE, In consideration of the sum of One dollar (\$1.00) paid by the party of the second part to the party of the first part, receipt of which is hereby acknowledged, it is hereby agreed by the party of the first part, that in consideration of the sum so above paid and of the premises here-

inbefore and hereinafter mentioned that the party of the second part shall at this time refrain in taking any legal proceedings in the matter of the protection of their claim by filing a libel against the Steam "JEANIE," the said party of the first part hereby undertakes and agrees that it will stand in the place of and accept services on behalf of the Steamer "JEANIE" in connection with any claim against said steamer, and will at any time that the party of the second part may desire to commence litigation appear in Court on behalf of said Steamer, and will give security for the payment of any claim which may rightfully be due against said steamer, notwithstanding the fact that the steamer may not at the time of the beginning of the suit be within the jurisdiction of the Court, and

IT IS HEREBY FURTHER AGREED By the party of the first part, that it is the intention and purpose of this agreement to place the party of the second part in the same position as though the Steamer "JEANIE" had been libeled and suit begun upon the date of the signing of this agreement.

W. F. Swan

ALASKA COAST CO.

For First Party

C. W. Wiley, Manager.

ALASKA PACIFIC FISHERIES

B. H. Claghorn

By C. A. Burckhart, President.

For Second Party

25. In compliance with the provisions of said agreement and in expectation that a reasonable settlement of its claims for damages would be effected

without litigation the Libelant did forbear to bring a suit to enforce said claim, until the date of filing its original libel herein, to-wit: September 29, 1913. (Testimony of C. A. Burckhart, p. 396.)

The written decision of the District Court evinces painstaking study of the evidence and correct conclusions; and in accordance therewith a decree was rendered awarding damages to the Libelant in the sum of \$12,796.26 with interest and costs.

APPELLANT'S ASSIGNMENT OF ERRORS.

Assignment numbered I controverts the Court's conclusion that the Jeannie was unseaworthy.

The Court based that conclusion upon a rule of law stated in the following quotation from a decision of the Supreme Court of the United States:

“As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that the vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect.”

The evidentiary facts sustaining the conclusion are as follows:

On her north bound trip from Seattle to Alaska the Jeannie carried a cargo of coal in bulk. This is proved by the testimony of Capt. Karbbe and Gunther, witnesses for the appellant. (Record, pp.)

The canned salmon was packed in first-class condition for market. (Testimony of F. O. Burck-

hart, Heckman, C. A. Burckhart, and Horner. Record, pp. 80-81-90-102, 152-20-5.)

The cases were dry and clean when taken into the ship. (Deposition of Banbury. Record, p. 434.)

The tarpaulins used for covering the hatches were old, perforated and rotten; before commencing the voyage Capt. Karbbe asked for new tarpaulins and they were not furnished. (Testimony of F. O. Burckhart, C. A. Burckhart and Roberts. Record, pp. 85, 117, 154.)

One of the floor planks in the bottom of the ship's hold became displaced, making an opening in the floor in near proximity to where part of the cargo of salmon was stowed, through which bilge water swashed upon said cargo. The displacement of said plank is not accounted for except by a supposition of a witness that it was loosened and floated by action of the bilge water in the ship. (Testimony of Gunther. Record, pp. 349-350-364-5.)

The same witness, who was an officer of the ship, testified that the only explanation he could give for the wetting of the cargo in different parts of the ship was that when the ship was rolling in heavy seas bilge water swashed through cracks or seams in the skin of the ship. (Record, p. 354-5-6-7, 366-7.)

When the salmon cargo was discharged at Seattle, more than four thousand cases and the cans therein were found to be damaged by being wet with seawater and bilge water and soiled with coal dust which had sifted through the cargo spaces and into the cases. (Testimony of F. O. Burckhart, C. A.

Burckhart, Isted, Horner, and West. Record, pp. 83-5, 104-5, 119-120, 155, 330, 356.)

Many of the damaged cases were stowed in the space directly beneath one of the hatches. (Same testimony last cited.)

The foregoing facts and circumstances are established by convincing evidence and they lead with absolute certainty to the conclusion that at the time of the voyage in question the Jeannie was not staunch nor tight and that her cargo spaces were not cleansed sufficiently to make her fit as a carrier of foodstuff. Therefore by the rule above quoted she was not seaworthy.

Assignment numbered II asserts error in finding that there was an oral understanding or agreement for the transportation of the said cargo.

The facts are that at the time of said voyage the Jeannie was being operated by charterers, and W. F. Swan was her manager. (Testimony of Swan and Dawson. Record, pp. 318-319.)

C. A. Burckhart was president and manager of the Libelant Corporation. (Record, p. 152.)

While the Jeannie was in Alaska Burckhart, at Seattle, verbally requested Swan to have the Jeannie bring the salmon from the canneries to Seattle. (Testimony of Swan. Record, pp. 320-321.)

Swan telegraphed instructions to the Captain of the Jeannie to bring the cargo to Seattle and the steamer did bring the cargo pursuant to said telegraphic instruction. (Testimony Karbbe. Record, pp. 248-296.)

Assignment numbered III tapers off at the end to a mere criticism of the choice of words used by Judge Neterer to express the idea that a watchman has no implied authority to make contracts binding upon his employer. Enough said.

Assignment numbered IV asserts error in rejecting Appellant's contention that the ship was released from liability for damages in this case by virtue of certain clauses in the documents pleaded in the amended answer as bills of lading and by reason of failure of Libelant to comply with the terms and conditions of said clauses relative to filing its claim and commencing suit within a specified limit of time.

The preposterous idea of basing a defense on said documents was not hatched until after the filing of the first answer in this case.

Section 4, of the Harter Act prescribes that it shall be the duty of the owner, master or agent of any vessel to issue a bill of lading for merchandise received for transportation.

Said so-called bills of lading were not issued by either the owner, master or an agent of the Jeanie, but were made up and signed by Banbury acting in the capacity of purser; and he had no authority to make contracts for the ship, her owner, master, or her charterers. (Deposition of Banbury. Record, p. 434.)

Banbury admitted having told F. O. Burekhart that he was uncertain whether he delivered copies to Swan for the Libelant or sent them by mail. If

otherwise delivered they were handed to watchmen at the several canneries in Alaska.

They were never assented to by any officer of the libelant corporation or consignee of the cargo, nor seen by either of them, until copies appeared annexed to the amended answer. (Testimony of F. O. Burckhart, C. A. Burckhart, and Stipulation. Record, pp. 374-375, 393-394, 399.)

By an agreement in writing executed by the Appellant and Libelant subsequent to the overhauling and reconditioning of the cargo, Libelant's claim for damages was recognized and the right to maintain a suit, *in rem*, against the Jeannie was preserved and time for commencing said suit was extended indefinitely. (Testimony of C. A. Burckhart, and Libelant's Exhibit B. Record, pp. 395-396.)

Assignment numbered V asserts error in denying exemption of the Jeannie from liability by virtue of the Harter Act.

Any exemption from a common carrier's liability for damage to cargo under that act is dependent upon a condition precedent that the owner shall exercise of due diligence to make the carrying vessel in all respects seaworthy and properly manned, equipped and supplied at the time of dispatching her on a voyage; and when due diligence has been exercised the exemption from liability is restricted to losses or damage resulting from specified causes, not including negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery

of merchandise committed to the ship or its owner's, master's or agent's charge.

Instead of exercising due diligence to make the Jeannie seaworthy at the time of her departure from Seattle, or at any port of call during the progress of the voyage there was not even a survey, or inspection, to ascertain her condition; and damage to the Libelant's goods is a direct result of failure to supply equipment, to-wit, new tarpaulins, necessary for hatch covers which her master requested. The evidence proving these facts has been cited as affecting the first assignment.

The nature of the damage to the cargo proves conclusively negligence in failure to properly stow and dunnage the cargo and protect it from bilge water coming through cracks and openings in the skin and floor of the ship and from coal dust.

This is an action founded upon a tort and the gravamen of the case is in the personal negligence of the Jeannie's master. His own testimony proves that he consciously neglected his duty with respect to the handling and care of the cargo; when it was his business to supervise the loading instead of seeing whether or not the interior of the ship was clean and in fit condition for a cargo of foodstuff or giving any attention to the manner of stowing and dunnaging the cargo, he went to bed; and he was so absolutely careless concerning the cargo that he knew nothing whatever of any damage until after the ship had been discharged, although the damage was so well known to others before the ship left

Ketchikan that the ship's manager received news of the fact at Seattle by telegraph at the very time when the ship was encountering the most violent storms to which she was exposed during the entire homeward voyage. (Testimony of Karbbe. Record, pp. 255-258, 262, 279; Roberts, p. 112. Deposition of Cochran, p. 413.)

Assignments numbered VI, X and XI are general and merely challenge the merits of the Libelant's whole case.

Assignment numbered VII asserts error in allowing, as part of the damages awarded, the expense of overhauling and reconditioning the cargo.

By incurring that expense a much heavier loss, approximating a total sacrifice of \$85,000 worth of merchandise, was averted, for the cargo as an entirety in the condition in which it came out of the ship was unmerchantable. (Testimony of Isted, and C. A. Burekhart. Record, pp. 121-157.)

About one-half of the damaged cases were set apart on the dock when they came out of the ship; other cases, which were damaged or contained soiled cans, were mingled promiscuously throughout the entire mass so that it was necessary to open and repack every case. All of the work done was necessary to restore the goods to marketable condition and the amount charged and paid therefor was reasonable. (Testimony of C. A. Burekhart, Isted, Horner, and West. Record, pp. 158, 121, 197-8-9, 170, 223-4, 229.)

Assignments numbered VIII and IX assail the

decree for awarding damages according to the established legal rule for measuring damages for detention of merchandise.

During the seventy days while the goods were in the possession of the contractor who cleaned and scoured and relabeled and repacked the same and until his bill for doing that work was paid, the goods could not have been sold for immediate delivery. (Testimony of C. A. Burckhart. Record, p. 175.)

In practice sales of canned salmon for future delivery are made after the close of the canning season until the end of December, but after January the trade requires immediate delivery when a purchase is made except in rare instances. (Testimony of Small. Record pp. 149-150.)

The Kelly-Clarke Co. is a selling agency having the marketing of Libellant's goods and the products of other canneries; their method of filling orders, unless the products of a specified cannery is called for, is to pro rate among all their clients in proportions according to the quantity each may have available at the time when delivery is required, e. g., in filling an order for 10,000 cases when Client A has on hand 50,000 cases, Clients B and C each have 20,000 cases, and Client D 10,000 cases, one-tenth of the stock of each would be sold. (Testimony of Small. Record, pp. 139-140.)

There is always risk of loss in transit from the cannery to the trade center and for that reason, in order to get the benefit of opportunities for quick sales it is necessary to have the goods in stock

where immediate delivery can be made to purchasers; just as in all lines of trade the merchant who has goods to sell has an advantage over competitors who must get goods before they can fill an order.

By natural law, ready supply attracts purchasers, as demand stimulates production. That is the obvious reason why the Libelant, instead of waiting till March to move the goods from its canneries where there would have been no storage charges, caused the Jeannie to bring a cargo in December and thereby incurred expense for storage in a Seattle warehouse. (Testimony of C. A. Burckhart. Record, p. 405.)

Between January 10, when Libelant's goods should have been on sale, and March 21, when the contractor was ready to deliver the same in restored condition, the market value declined and thereby Libelant suffered an actual loss in depreciated value of its goods to the amount awarded as damages for that cause. (Testimony of Small and C. A. Burckhart. Record, pp. 133-134, 159-160.)

Judge Neterer's opinion in this case is sound in reason and amply supported by the authorities therein cited. We submit that the assignments of error are each and all groundless.

This Court may not go further in consideration of the case than is necessary to dispose of the assignments of error; nevertheless in theory an appeal in an Admiralty case entitles the parties to a trial *de novo*, and on this theory we will now make

our argument, based on the facts hereinbefore stated.

ON THE MERITS.

The case for the Libelant rests upon the following propositions of law, supported by authorities:

I.

Although the relation of the parties became established by a contract, the cause of action is not a breach of the contract *by mere non-performance without injury to the goods*, but the cause of action is for an injury inflicted by wrongful conduct in violation of the duty which the law imposes upon a common carrier.

The Escanaba, 96 Fed. Rep. 252.

The Quickstep, 9 Wall. 665.

Atlantic & Pac. R. Co. v. Laird, 164 U. S. 393.

The John G. Stevens, 170 U. S. 124; 18 Sup. Ct. 544.

Central Trust Co. v. East Tenn. V. & G. R. Co., 70 Fed. Rep. 764-7.

California-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. Rep. 5.

II.

When not otherwise provided by a special contract, a common carrier of merchandise for hire, by sea, is bound to the absolute duty of furnishing a seaworthy vessel. This implies that the ship shall be at the time of her departure from any port, with cargo on board, staunch, water tight, well provi-

sioned, manned by competent officers and crew, well equipped and properly provisioned for the particular voyage to be undertaken to the extent of being able to ride out successfully all such storms and rough seas as are expected to be encountered between the ports of loading and discharge, and to have her cargo well stowed, dunnaged and protected.

III.

In every contract of affreightment there is an implied warrant of seaworthiness of the carrying vessel and an obligation of the carrier to safeguard, and transport the cargo to its destination without unreasonable delay and make right delivery there, promptly.

The Caledonia, 43 Fed. Rep. 681, was a suit by a shipper for damages for delay in transportation of cattle, caused by the breaking of the carrying steamer's shaft; there was a preliminary agreement for the transportation service, and subsequent thereto a Bill of Lading containing exemption clauses was signed and accepted by the Libellant; there was a loss by decline in the market value of the cattle during the time of delay in reaching destination. In his decision Mr. Justice Gray said:

“When the parties have made such a contract, the ship owner cannot, without the shipper's consent, vary its terms by inserting new provisions in a bill of lading, * * * In the case at bar, the unseaworthiness of the vessel consisted in the unfitness of her shaft when she left

port, * * * The exception of 'steam boilers and machinery, or defects therein,' inserted in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening after the beginning of the voyage, must, by elementary rules of construction, and according to the great weight of authority, be held to be equally limited in its scope, and not to affect the warranty of seaworthiness at the time of leaving port upon her voyage. * * * A common carrier, receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the same place afterwards, and when their market value is less, is responsible to the owner of the goods for such differences in value. * * * The same general rule has been often recognized as applying to carriers by sea in this circuit as well as in the second circuit."

In accordance with the opinion a decree for damages was awarded, and on appeal affirmed in 157 U. S. 124; 15 Sup. Ct. 537, 39 L. Ed. 644. In the opinion of the Supreme Court, it is said that:

"In our opinion the ship owner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and this being so, that undertaking is not discharged be-

cause the want of fitness is the result of latent defects.”

The Lillie Hamilton, 18 Fed. Rep. 327.

In this case a schooner of the type known as a canal vessel sank in the Welland Canal, after bumping on a rock and the suit was for resulting damage to her cargo of corn. The Court held that the vessel was unseaworthy and the opinion contains the following quotation:

From 3 Kent's Commentaries 205:

“By the contract the owner is bound to see that the ship is seaworthy, which means that she must be tight, staunch, and strong, well furnished, manned, victualed, and in all respects equipped in the usual manner for the merchant service in such a trade. The ship must be fit and competent for the sort of cargo and the particular service for which she is engaged. If there should be a latent defect in the vessel unknown to the owner, and undiscoverable upon examination, yet the better opinion is that the owner must answer for the damage occasioned by the defect. It is an implied warranty in the contract that the ship be sufficient for the voyage, and the owner, like a common carrier, is an insurer against everything but the excepted peril.”

From the opinion of the Supreme Court in the case of *Dupont de Nemours v. Vance*, 19 How. 162:

“To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so

tight, staunch, and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo.”

And this from the Supreme Court decision in *Work v. Leathers*, 97 U. S. 379:

“Where the owner of a vessel charters her, or offers her for trade, he is bound to see that she is seaworthy and suitable for the service in which she is to be employed, and if there be defects, known or not known, he is not excused.”

In the opinion of the Supreme Court in *The Silvia*, 171 U. S. 464, Mr. Justice Gray said:

“The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.”

In the *Southwark*, 191 U. S. 9, Mr. Justice Day said:

“As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that the vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that respect.”

The Lizzie W. Virden, 8 Fed. Rep. 624; and 11 Fed. Rep. 903.

This suit was for damage to a cargo of almonds carried in a vessel which had carried petroleum on her preceding voyage, and the flavor and odor of petroleum was imparted to the almonds. The Court

held that the damage did not arise from a peril of the sea; the contract was to provide a vessel fit to carry such a cargo as was actually carried, and the vessel provided was unfit for the purpose.

The Hudson, 122 Fed. Rep. 96.

In this case the Court awarded damages for bad odor from part of a cargo of tanned skins affecting other cargo of tea in the same vessel. It became necessary during the voyage, owing to a threatened storm, to remove ventilators and plug openings for twenty hours, and in defending the ship it was claimed that the damage occurred at that time and was from a danger of navigation, within exceptions of the bills of lading and section 3 of the Harter Act. The Court held that the proximate cause of the damage was negligent stowage, for which the ship was not exempted from liability.

The Florida, 69 Federal 159.

This is a parallel case to the one in hand. The ship was held to be liable for damage to a consignment of filberts by coal dust.

The Mississippi, 113 Fed. Rep. 985; and 120 Fed. Rep. 1020.

In this case the ship was held liable for damage to furs and skins by leakage from drums containing glycerine, due to negligence in stowage, notwithstanding stipulations in the Bill of Lading exempting the ship from liability for damage to cargo protected by insurance; and the Harter Act was held to be not applicable. On the voyage the ship en-

countered great severity of weather and on arrival it was found that a number of the drums were chafed through and empty, and the dunnage and chocks were broken up in small pieces.

Corsar v. Spreckels, 141 Fed. Rep. 260.

This is another case of unseaworthiness, due to bad stowage. A cargo of cement was not properly distributed to give the ship the greatest ease, an excessive proportion being stowed in the lower hold. In the vicinity of Cape Horn, where the weather was rough the rolling of the ship strained her, so that her seams opened and leakage damaged the cargo; extreme bad weather compelled abandonment of the attempt to round Cape Horn and the voyage to San Francisco was completed via the Cape of Good Hope and Australia; and part of the cargo had to be shifted by moving some of the cement further aft and bringing some of it from the lower hold up to the 'tween deck. The Circuit Court of Appeals for the Ninth Circuit held, upon the ground that the cargo was insufficiently stowed for the voyage undertaken, the Libellant to be entitled to recover the full amount of the loss and damage sustained. It was decided so by a majority of the Judges in opposition to a dissenting opinion by Judge Gilbert, saying:

“But the evidence is convincing that the weather encountered off the Horn was unusual. For a period of about 50 days there was unusual gales. A large portion of that time the ship lay to the wind.”

The decision by a majority of the Court has been strengthened by a citation of it in a later decision by the same Court, in which Judge Gilbert concurred.

See:

Rainey v. New York & P. S. S. Co., 216 Fed. Rep. 453.

In the case of *Nine Hundred and Twenty-eight Barrels of Salt*, Fed. Cas. No. 10,272, on a voyage from Oswego to Chicago a schooner encountered a heavy gale of wind on Lake Huron and her rudder post was split so that she could not be steered by her rudder and an expense was incurred for towage, which the Court held to be not a proper subject for general average. This was because the vessel was deemed to be unseaworthy in not being provided with a rudder of sufficient strength to meet the hazards of ordinary sea perils. Therefore the cargo was not liable to contribute to the expense incurred for towage.

In the case of *The C. W. Elphicke*, 122 Fed. Rep. 439, the vessel was held liable for damage to the cargo by reason of her unseaworthiness in failure to provide tarpaulins and hatch covers sufficient to prevent leakage when her decks were flooded in heavy weather, and it was held that a heavy gale on Lake Erie was to have been anticipated in the season of the year when the voyage was undertaken, and that to make the vessel seaworthy she should have been provided at the commencement of her voyage with sufficient hatch covers to prevent leakage.

IV.

For the due observance of the carrier's obligations with respect to merchandise received for transportation in a ship, the cargo owner has a maritime lien upon the ship, enforceable by a suit *in rem* in a court having admiralty jurisdiction.

“Shippers have a lien by the maritime law upon the vessel employed in the transportation of their goods and merchandise from one port to another, as a security for the fulfilment of the contract of the carrier, that he will safely keep, duly transport, and rightly deliver the goods and merchandise shipped on board, as stipulated in the bill of lading or other contract of shipment.” *The Belfast*, 7 Wall. 642.

“The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the maritime law. It is found asserted in a variety of forms in the Consulado, the most ancient and important of all the old codes and sea laws.” *Dupont de Nemours v. Vance*, 19 How. 168.

Other authorities are very numerous among the admiralty decisions of the Federal Court.

V.

Proof that merchandise in good condition was received for transportation in a ship and when delivered at destination was in a damaged condition,

makes a *prima facie* case, imposing liability and a maritime lien upon the ship for damages.

In the case of *The Queen*, 78 Fed. Rep., on page 164, the Court said:

“The allegation of the libel is that the merchandise was returned to the port of San Francisco in a greatly damaged condition by reason of having been wet with sea water during the said voyage, which, through the negligence of said steamship company and its officers and servants, gained access to the interior of the ship, where said merchandise was stowed. The burden of proving this allegation was upon the libelants; but, it being established that the merchandise had been returned to the port of shipment in a greatly damaged condition by reason of having been wet by sea water, a legal presumption of negligence arose which was attributed to the carrier because of this circumstance, and upon this presumption the libelants rested their case. But this legal presumption of negligence now placed upon the carrier was based upon a presumption of fact, that the vessel having become unfit to prosecute her voyage without being visibly exposed to any extraordinary perils or dangers of the sea, was in an unseaworthy condition when the voyage began. * * * This presumption of fact was met by proof from the claimant * * * (page 165-6). In the present case, the claimant has introduced testimony tending to establish the seaworthy condi-

tion of the vessel when she set out on her voyage, and this testimony has not been contradicted. Now, if the only presumption of negligence arising out of the damaged condition of the merchandise was that the voyage had been commenced with a vessel in an unseaworthy condition, the Court would be compelled to hold that the claimant had sufficiently answered the *prima facie* case made out by the libelants; but this does not appear to be the full scope of the presumption of negligence attributable to the carrier under this aspect of the case. Underlying the contract is an implied warranty, on the part of the carrier, to use due care and skill in navigating the vessel and in carrying goods, and it may be that, through some carelessness or negligence on the part of the carrier during the voyage, goods laden on board the vessel may suffer damage. * * * (page 170). The contention of claimant that the libelants, having alleged negligence, must prove it affirmatively, and that they cannot rely merely upon the *prima facie* presumption of negligence which the law raises upon proof of the return of the goods in a damaged state, is not tenable; for, if this were so, it would do away entirely with the *prima facie* presumption of negligence against the carrier."

A decree awarding damages to the libelants was affirmed by the Circuit Court of Appeals for the Ninth Circuit, 94 Fed. Rep. 180; but was re-

versed by the Supreme Court, because of long delay without excuse in commencing the suit; the carrier being protected by a stipulation in the bill of lading limiting the time within which the suit should have been commenced. 180 U. S. 49.

In *The Rappahanock*, 184 Fed. Rep. 291, it was held, by the Circuit Court of Appeals for the Second Circuit, that the burden rests upon a carrier, who, having agreed to deliver in good condition, "the dangers of navigation excepted," delivers cargo water-damaged, to show that the damage was caused by a danger of navigation; and proof that rough weather was encountered on the voyage, but not worse than was to be expected at the season, and that the damage was from leaking of a main feed pipe running through the cargo space was not sufficient to sustain the burden of proof resting upon the carrier to show that the damage resulted from a danger of navigation rather than from a defect in the pipe which rendered the vessel unseaworthy at the beginning of the voyage.

When a question arises at the end of a voyage as to the condition of the contents of casks, bales or cases when received by the ship the rule is that the burden is on the shipper to show by evidence that such contents were in good condition when so received. To this rule there appears to be attached this qualification: If the external covering of the goods is so damaged when they are delivered as to account for the injury to the contents, then such

evidence may be dispensed with. *The Solveig*, 217 Fed. Rep. 807.

In the case of *The Giulia*, 218 Fed. Rep. 744, a cargo of hemp was damaged by fresh water running out of a pipe in consequence of displacement of a plug. The master of the ship testified that, very bad weather was encountered in the month of December, that his ship was rolling badly and the seas coming on deck, that the feed pipe to a condenser broke, as did one of the valves in one of the boilers, that he was compelled to stop and put out a sea anchor and that the gale was so strong that the pipe rope to the sea anchor broke, and that on arrival in port he made a regular protest. The statements in the protest were to the effect that from December 18th to the 26th there was a strong northerly gale, the sea was high and rough, the ship rolling and pitching with heavy seas breaking over her decks, on December 24th furious storms, with high tempestuous seas, ship rolling fearfully, and decks flooded; on December 25th heavy seas, ship rolling heavily; on the 26th sea rough, and ship plunging fearfully, and taking seas all over.

The opinion of the Court states:

“It is admitted that the bales of hemp were received by the carrier in good condition and delivered in bad condition. That being so, there certainly is no question but that the carrier, in seeking to be relieved from liability for damages under the exceptions of perils from the sea, was bound to prove that the injuries were the

result of such untoward circumstances as could not have been anticipated and guarded against by the exercise of ordinary care and prudence. * * * Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence. * * * We are not convinced that the cargo ever shifted, or that, if it did shift, that it displaced the plug running to the fresh water tank, the water from which in our opinion damaged this cargo."

On that conclusion a decree of the District Court in favor of the libellant for damages was affirmed.

VI.

Exemption of a ship from liability for damages to her cargo in transit must be based upon facts essential to a legal defense, alleged and proved affirmatively by the respondent.

The Patria, 125 Fed. Rep. 425, 132 Fed. Rep. 971; *Wright v. W. R. Grace & Co.*, 203 Fed. Rep. 360.

These two cases fit each other and together they make a parallel to the case at bar; the first was a case of damage by coal dust and the second was for damage by sea water admitted into the interior of a vessel through her hatches. The sense of the deci-

sions of all the Judges who participated therein, is in the syllabus on page 425 of volume 125:

“Where the evidence shows that a carrier received goods on board in good condition, and delivered them damaged, it has the burden of proof to show that the damage was due to a risk excepted in the bill of lading, and, in the absence of satisfactory proof that such was the cause, it must be held liable for the loss, although the cause of the damage does not plainly appear.”

Ship owners do not intentionally expose lives and valuable property to the dangers of the deep in unseaworthy craft, nevertheless, unseaworthiness is a cause of so much litigation that courts are all Missourians, they require seaworthiness to be shown.

In the first place there can be no presumption of seaworthiness in such a case as this. *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. It must be affirmatively proved by the ship owner.” Per Holt Judge, in *The River Meander*, 209 Fed. Rep. 937.

The Folmina, 212 U. S. 363.

This case was sent to the Supreme Court for its answer to a certified question as follows:

“Whether damage to the cargo of an apparently seaworthy ship, through unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew

of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from the act of God, * * * loss or damage from * * all and every the dangers and accidents from the seas, rivers, and canals and of navigation of whatever nature or kind."

In its opinion the Court said: The answer to be given

"will be fixed by determining upon whom rests the burden of proof to show the cause of the damage, when goods which have been received by a carrier in good order are by him delivered in a damaged condition. * * * It was long since settled in *Clark v. Barnwell*, 12 How. 272, that where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them at the termination of the voyage in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of the damages has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible. But as illustrated by the case of the *G. R. Booth*, 171 U. S. 450, 43 L. Ed. 234, 19 Sup. Ct. Rep. 9, proof merely of damage to cargo by sea water does not necessarily tend to establish that such damage to cargo was caused by a peril or danger of the seas."

Accordingly, "No," was the answer given to the certified question.

The Anna, 223 Fed. Rep. 558.

This is a recent case, in which the District Court for the Eastern District of Pennsylvania held a long voyage in tempestuous weather to be insufficient to relieve the ship from liability for damage to her cargo by seawater.

VII.

The implied warranty of seaworthy condition of a ship at the commencement of a voyage is not abrogated by the Harter Act.

VIII.

Due diligence upon the part of the ship-owner, to see that the carrying ship is actually seaworthy at the time of commencing a voyage, is a condition essential to any valid claim of exemption of the ship from liability for damages to her cargo in transit, under the provisions of the Harter Act.

The first four sections of the Harter Act are as follows:

Be it enacted &c., That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability for loss or damage

arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agents, or charterers, shall become or be held responsible for

damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or from loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Sec. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. Act of Feb. 13, 1903, 27 U. S. Stat. 445; 3 U. S.

Comp. Stat. 2946; Pierce's Fed. Code, Secs. 2133-6; 4 S. F. A. 854.

The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181, is the leading case holding that the law of implied warranty of seaworthiness at the commencement of a voyage has not been changed by the Harter Act.

Referring to that case Judge Gilbert in *The Indrapura*, 190 Fed. Rep. 714, said:

“In that case it was held that the Harter Act did not exempt the vessel from liability for injury caused by a latent defect.”

The Jean Bart, 197 Fed. Rep. 1002.

In this case the negligent failure of the master of the vessel to make proper use of the ventilating apparatus during the course of a five months' voyage, by reason of which, and the presence in the cargo of a large quantity of coke, the wicker or straw coverings on a large number of wine bottles were sweated and ruined, was the ground of complaint. In its opinion the Court said:

It is contended, however, that under the provisions of the Harter Act * * * the owner is not chargeable with such negligence of the officers of the ship. * * * Section 1 of the Act, however, provides that it shall not be lawful for the master or owner of any vessel to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be released from liability for loss

or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any merchandise or property. The question therefore is whether the failure to properly use the ventilating equipment is a fault or error in navigation or in the management of the ship under the third section; or whether it is negligence, fault, or failure in proper * * * care * * * of merchandise or property * * * I am of the opinion that here the failure of the officers primarily related to the care of the cargo, * * * The general conclusion reached is that the libelant is entitled to recover the damages sustained, with interest and costs.

The R. P. Fitzgerald, 212 Fed. Rep. 678.

In this case exemption from liability was claimed on the ground that the proximate cause of the damage to a cargo of wheat, was carelessness of a seaman who in cleaning an oil tank loosened a seam causing the tank to leak. The Court said that the contention of the claimant that carelessness in cleaning the tank was the proximate cause of the damage, and that, being excused, by the third section of the Harter Act, from its results as a fault or error in management, the libelant cannot recover, has no sanction in the law.

“It will be seen that the question is not one of relative operating causes, proximate or remote. It has to do with the circumstances under which the owner of a vessel is relieved by

the operation of the act from consequences for which he would have been responsible prior to its enactment, and involves his responsibility for the condition of his vessel at the inception of the voyage to carry the cargo which he has contracted to transport."

The opinion quotes the following excerpts from Chief Justice Fuller's opinion in the case of *International Navigation Co. v. Farr*, 181 U. S. 218-226, 21 Sup. Ct. 591, 45 L. Ed. 830.

"Seaworthiness at the commencement of the voyage is a condition precedent, and fault in management is no defense when there is lack of due diligence before the vessel breaks ground.
* * * We repeat that, even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

Further on the opinion states:

"The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport."

Citing,

The Sylvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241,

The Southwark, 191 U. S. 1-9, 24 Sup. Ct. 1, 48 L. Ed. 65.

“ * * * In exercising the degree of care imposed upon the owner by the law (*The Irrawaddy*, 171 U. S. 187, 192; 18 Sup. Ct. 831, 43 L. Ed. 130; *The Tenedos*, 137 Fed. 443, 445), he will be required to take such precautions as are reasonably adequate for the protection of the cargo against known perils, or which reasonable foresight may have anticipated. (*The Jean Bart*, 197 Fed. 1002, 1003, 1004). * * * No doubt if the deck of a vessel were improperly calked and water from cleaning the deck, or from careless handling, or from ordinary perils of the sea, had leaked through to the damage of a load of wheat immediately below, there would be a condition of unseaworthiness. *The Ninfa*, 156 Fed. 512. * * *

The third section of the Harter Act is an act of grace, giving the owner exemption from acts of carelessness in management, such as improper cleaning of the oil can, if only he shows his vessel to have been seaworthy at the inception of the voyage and excuses him from liability to which he otherwise would be subjected for such negligence if, in spite of the negligence and notwithstanding the injury resulting therefrom, his vessel is seaworthy as against such acts, or he has used reasonable diligence to make her so.”

In *The Tenedos* 137 Fed. Rep. 446-7, Judge Holt said:

“The fact that ship owners are not in the

habit of using precautions which would demonstrate unseaworthiness is immaterial. They are bound to use them. *The Edwin I. Morrison*, 153 U. S. 217, 14 Sup. 823, 38 L. Ed. 688."

IX.

A Bill of Lading, not signed by either the owner, master, or agent of the carrying ship, nor assented to as to its stipulations, is not a contract, but a mere way bill, useful only, as a memorandum of merchandise received for transportation.

Exemption clauses and conditions in a bill of lading, delivered after the carrier has received the goods, are not binding upon the shipper unless expressly assented to by him.

Pacific Coast Co. v. Yukon Independent Transportation Co., 155 Fed. Rep. 37.

X.

The necessary reasonable expense of reconditioning merchandise damaged on ship board is an element of damages for which a maritime lien attaches to the ship.

When the 29,657 cases of salmon arrived at the Virginia Street Dock the libelant had to do something; and what was the common sense thing to do? The whole consignment might have been sacrificed by selling it for whatever trifling amount might have been obtainable for it in its damaged and unmerchantable condition and if that had been done the

libelant's claim against the *Jeannie* would have amounted to, approximately, \$85,000.00.

Western Manufacturing Co. v. The Guiding Star, 37 Fed. Rep. 641.

This was a suit *in rem* to recover damages on account of a consignment of butterine which by the carrier's fault was delivered at New Orleans in an unmerchantable condition, and was there sold for fifty per cent of the market value of good butterine. The legal measure of damages in such a case is stated in the syllabus as follows:

"The difference between the price for which the article was sold and the market value at the place of delivery on its arrival, had it been in good condition, with interest, is the proper measure of damages."

This Court held to that rule in the case of *U. S. S. Co. v. Haskins*, 181 Fed. Rep. 962.

The same rule as to the measure of damages was applied in the case of *The Berengere*, 155 Fed. Rep. 439.

It is the duty, however, of a party whose property has been damaged to minimize the loss as much as possible. And the right thing to do is what all the parties interested agreed should be done in this case, viz., have all the cases of salmon overhauled and restored to merchantable condition. That is what was done at an expense of \$4,283.06; the libelant paid that sum for necessary work, and that payment is an element of the damages to be assessed in this case.

“The owner of property being bound to exert himself to prevent damage, and to render the injury as light as possible, where he is so situated in respect to the subject in question as to raise that duty, may recover for his reasonable and necessary labor or expense for that object.”

3 *Sutherland On Damages*, 3rd ed. section 921.

“But it was the duty of libelant to use all proper efforts in reducing the loss as much as practicable. He fulfilled his duty, and saved all but 30,000 feet. This was a great saving to respondent. He should pay not only for the lumber lost, but also all proper expense incurred in saving the remainder.”

The Henry Buck, 39 Fed. Rep. 212.

XI.

When by the ship's fault delivery of cargo consisting of goods manufactured for sale, has been delayed, and the market price thereof declines, a right of action sounding in tort accrues to the cargo owner, and the measure of damages for mere detention is the difference between the market value at the date of delivery and at the time when delivery should have been made.

The libelant having paid the freight, was entitled to have the goods delivered in good condition, promptly on arrival of the *Jeannie* at Seattle, when the market value thereof was \$85,630.40, but during the time necessary for overhauling and repacking,

a period of seventy days, it was deprived of possession and power of disposing of said goods and at the termination of said period of detention the market value was \$77,695.00. Reimbursement for the cash paid out will not compensate for the loss proved; there was expense for storage, and insurance amounting in the aggregate to nearly one thousand dollars. Mere detention of saleable merchandise, having a market value, is an injury to a business man, and an actionable wrong. The law measures the compensation for such wrong by the amount of depreciation in market value during the time of detention.

“In an action against a carrier of goods for failure to deliver the same within a reasonable time, the measure of damages is the difference in value of the merchandise at the time and place it ought to have been delivered in the usual course of transportation, and at the time of its actual delivery or tender, *whether the difference in value was occasioned by injury to the goods or was due to a decline in the market value*, with interest added, and freight charges, if any unpaid, deducted.”

Moore on Carriers, 410.

In *The Caledonia*, 43 Fed. Rep. 681-686, Mr. Justice Gray stated the rule in the following words:

“A common carrier, receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the

same place afterwards, and when their market value is less, is responsible to the owner of the goods for such difference in value.”

A decree was rendered in that case according to the rule so stated, and it was affirmed by the Supreme Court in 157 U. S. 124, 39 L. Ed. 644.

The general rule that only compensation for *actual loss sustained* can be recovered is not inconsistent with this *special* rule, because depreciation in market value of goods intended for sale while the owner is wrongfully deprived of possession is, in a legal sense, an actual loss *non-constat* that, he may by holding for a possible subsequent rise in market value sell for a higher price and make a profit thereby.

The Alexander Gibson, 56 Fed. Rep. 603. In that case the ship was chartered to carry a cargo of wheat from Tacoma to Europe; there was a dispute between the ship's master and the charterer with respect to the choice of a stevedore to stow the cargo and consequent delay in loading. The ship was libeled before her departure, by the charterer to recover damages for breach of the charter-party contract; an appeal was taken from the decree rendered by the District Court to the Circuit Court, which then had appellate jurisdiction, and Judge Sawyer rendered a decree in the libelant's favor for the amount of damages computed on a decline of one shilling and six pence per quarter in the market price of wheat during the time of detention; and that decree was affirmed by the Circuit Court of Appeals. There was

no other claim for damages; the only breach of the Charter-party was in delay in loading; the wheat was not impaired in value by any injury to it as a commodity and there was no claim of loss of an opportunity to sell it during the time of the ship's detention at the loading port. The decision is clean cut, holding the carrier liable to the cargo owner for damages in the amount of depreciation in market value during the time of delay in performance of its contract.

The same rule is given in *Desty's Shipping and Admiralty*, section 256, and in the following cases:

- Page v. Munro*, Fed. Cas. No. 10,665;
- The Success*, Fed. Cas. No. 13,586;
- The Golden Rule*, 9 Fed. Rep. 334;
- The Giulio*, 34 Fed. Rep. 911;
- The City of Para*, 44 Fed. Rep. 689;
- The Berengere*, 155 Fed. Rep. 440.

The Appellant, to meet the exigency of its case, has tried to modify that rule, insisting that in such a case no amount of damages can be awarded unless an opportunity for an actual sale has been lost in consequence of the delay; and that if the owner of the merchandise has in stock other goods sufficient to supply the market demand he is precluded from claiming any such loss of an opportunity to make an actual sale of the particular goods.

In practical effect this theory would discriminate thus: Brown, being the owner of a cargo in the custody of a carrier and by being prevented from

consummating a sale thereof by reason of inability to make delivery to a buyer in consequence of the carrier's delay and having no other goods acceptable to his customers would, in case of a decline in market value, have a valid claim for damages against the carrier; whereas Jones, being the owner of a similar cargo and also possessed of other goods sufficient to supply the trade during the time of delay in delivery of his cargo, by the carrier's fault, would, notwithstanding a decline in market value, have no right to recover damages. In Brown's case, his own lack of forehandedness would be the foundation of a valid cause of action; in Jones' case the carrier's culpability would be inconsequential.

Evidence of a contract of actual sale of the salmon and loss of profits which would have accrued to the libelant from consummation of sale, by reason of inability to make delivery to the buyer in consequence of the respondent's fault would be irrelevant in this case because the vessel would have no relation to such a contract. It was so held by Judge Wolverton in the case of *The Berengere*, 155 Fed. Rep. 439-440.

XII.

Interest at the rate of six per cent per annum, on the amount of money necessarily expended in consequence of a maritime tort, from the date of payment thereof, is also an element of damages for which the ship is liable.

Six per cent per annum is the legal rate of in-

terest in the State of Washington and the customary rate in Admiralty causes.

In the case of *The Nith*, 36 Fed. Rep. 86-96, merchandise was so damaged in transit from Liverpool to Portland that when discharged from the ship at the end of the voyage it was unmerchantable. In heavy weather when the ship's deck was flooded, a rent in the main mast coat made an opening through which sea water was precipitated into the interior of the ship. In his decision Judge Deady determined that notwithstanding the sea peril the ship was liable for the damage to cargo, because of negligence in bad stowage, and awarded as damages the amount of the market value of the merchandise and interest thereon at the legal rate in Oregon. On appeal to the Circuit Court, Judge Sawyer affirmed the decree (36 Fed. Rep. 383); and that case as an authority for allowance of interest on the amount of damages recoverable for injury to cargo, is cited approvingly in the opinion of this Court in the case of *Steamship Wellesley Co. v. C. A. Hooper & Co.*, 185 Fed. Rep. 733-740, in which the Court said:

“We find no merit in the contention that the Court made an error in calculating the number of shingles lost or in awarding damages at 7 per cent per annum compounded at the date of the decree. Seven per cent was allowed as the legal rate of interest fixed by the law of California.
* * * Nor was it error to award interest on the whole of the decree from the date thereof.”

This Court has disapproved allowances of interest on damages for personal injuries; and, in the case of *The Rickmers*, 142 Fed. Rep. 314, has held that in cases of damage to property, interest may be allowed or refused in the exercise of judicial discretion. Having that decision in mind, we appealed to the discretion of the District Court, in submitting this case on final hearing, to allow interest at the legal rate on the amount of money paid by the Libelant for restoring the goods to merchantable condition; and interest on that amount from the date of the payment to the date the decree was allowed.

We respectfully submit that the decree is right and pray for affirmance thereof.

C. H. HANFORD,
KERR & McCORD,
Proctors for Appellee.

ANSWERING APPELLANT'S BRIEF.

A laborious argument, to prove that the Jeannie was seaworthy, concludes, on page 40 of the appellant's brief, in a plea for limitation of the damages to be awarded. The last sentence reads as follows:

"The only evidence in the case as to the amount of damage from each cause is the estimate of Mr. West that about 15 per cent was coal dust damage, and the award would have to be made on this basis."

Fifteen per cent of what?

The value of the cargo was \$85,630.40. Fifteen per cent of that total, exceeds the amount which the decree awards.

That plea, whatever other meaning may have been intended, amounts to an admission of failure in the attempt to prove that the Jeannie was seaworthy; and the authorities cited and the evidence reviewed lead with unerring directness to that conclusion.

The testimony of West proves that the cargo was damaged, as it could not have been in a seaworthy ship.

The testimony of Gunther proves that the libellant's goods were damaged by coal dust, by seawater and by bilge water. He gave as the only explanation for the wetting of cases next to the walls of the ship's hold that bilge water must have been spurted through cracks and seams in the skin of the ship.

The other witnesses had no knowledge, by personal inspection of the condition of the ship, with respect to her fitness for carriage of the cargo. Capt. Karbbe

did not see how the cargo was stowed or protected; he did not go down into the ship's hold at any time during the voyage. He told Mr. Roberts that he asked for new tarpaulins needed for hatch covers and that they were not furnished. This was not denied by him nor by Manager Swan.

The mere supposition that seawater entered through an anchor locker and through a seam in the deck next to a hatch coaming will not exculpate the ship. It matters not whether water gained entrance because of rotten hatch covers, or general infirmity; nor will the court conjecture that the leakages commented on in appellant's brief were caused by straining when the ship was rolling in tempestuous weather. The planks next to the keelson are the firmest in the floor of a ship; next to her bulwarks and hatch coamings are the strongest parts of her deck; and an anchor locker is about the last place in a ship to be affected by strain when the ship is rolling.

Ships are designed to roll and plunge in billowing seas, and the notion that the Jeannie was so good a ship that she could, with six hundred tons of freight on board, enter a narrow rocky channel, choose a soft place there, sink into mud to a depth of four feet and rest there until a flood tide released her without being injured in any way to affect her seaworthiness; and that the same ship on the same voyage was so tender that just rolling in deep water strained her and made leakages, will not take with any one who has had experience in maritime litigation.

Just a little coal dust in a wet ship will not permeate a well stowed cargo; nor will the spurting of bilge water wet a cargo when there is sufficient space and dunnage between it and the skin of the ship.

All this excludes every hypothesis except that the Jeannie was not clean, nor water tight and her cargo was not properly stowed, dunnaged, and protected. Mr. Gunther's testimony to the contrary is unbelievable.

HORNER'S BILL.

In the brief the bill which the libelant paid for overhauling and reconditioning the cargo, is pecked at. It is said that there was short delivery to the extent of thirteen cases and the bill includes a charge of six cents per case for opening, examining and repacking that number of cases in excess of the number actually so treated; that a charge was made for opening and repacking all the cases although only 4,088 were found to be damaged; that there are some errors in the computation of the number of cans relacquered and relabelled and the bill includes the cost of new labels and materials in excess of the quantity actually used; and finally that the libelant was benefitted by the overhauling and repacking of the goods for which a set-off is claimed.

There is, in the record, no contradiction of Mr. Horner's testimony that the bill is for no more than the just cost of the service he rendered; the libelant regarded it as just and paid it in full instead of higgie-haggling for trifling reductions, for the bene-

fit of whomsoever should ultimately have to bear the loss. The Jeannie received for transportation 29,657 cases and freight money for that number. Now if thirteen of those cases were never delivered, the appellant should pay or tender the value thereof before complaining to this court about an excess charge in Horner's bill of 78 cents. *De minimis non curat lex.*

It was not an extraordinary thing, nor imprudent for Mr. Horner to procure in advance a supply of labels and box materials on an estimate of the necessary quantities and if he had been obliged to sue either of the parties to this suit to collect his bill it is not probable that a defense *pro tanto* for the value of labels or materials left on his hands would have prevailed.

EVIDENCE AS TO MARKET VALUE.

The appellant's argument, assuming that there is lack of evidence to prove the market value of libellant's goods, is hypercritical. It is said that none of the witnesses knew anything about market value; this notwithstanding quotations of testimony showing conclusively that the witnesses had to know and did know all about the market fluctuations at Seattle, that being the place where they carry on their business in selling and shipping Alaska salmon to supply the trade.

It is said that the evidence had reference only to the per case value and does not prove the market value of stocks in bulk and further that only the

values of grades and brands of libelant's goods were inquired about and nothing said as to the particular value of the specific goods comprised in the Jeannie cargo. The comment on the Supreme Court decision in the Caledonia case on page 107 of the brief is that, the Court applied the rule of loss of market price because "it is found as a fact that these parties knew and contemplated that the cattle were not to be sold before arrival, but were to be sold at the first possible market day after arrival." The inuendo being that in this case the Jeannie people might have innocently supposed that the Burckhart brothers were operating three canneries in Alaska merely to catch and can enough salmon for their own eating.

Now the whole of this argument is well refuted in Judge Neterer's memorandum decision and there is no substantial reason for reversal of his findings as to market value. The goods were shipped in due course of an established business to meet the demands of trade, that is, to be sold in such lots as purchasers might require. It was so understood because the Jeannie had been carrying other consignments of canned salmon from the libelant's canneries to Seattle. Testimony of Swan, Record, p. 320.

5500 CASES OF CHUMS.

A claim is made that, although the market price of certain brands of canned salmon of the grade known to the trade as "chums" declined while the Jeannie cargo was being overhauled, part of said cargo, to-wit: 5500 cases of chums were actually sold and

shipped previous to the slump in price; and that a deduction of \$1,650.00 from the award should be made for that reason.

This is an after thought; no such contention was made in the District Court, at, before, or after the final hearing; and the point is not suggested in the assignment of errors.

For that reason the whole argument in support of this claim violates this court's eleventh rule; and we refrain from offering any reply.

We deny the claim, however, and will give reasons, orally, at the hearing, if requested by the Court to do so, as the rule provides.

C. H. HANFORD,
KERR & MCCORD,
Proctors for Appellee.

No. 2647

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY,
vs. Appellant,
ALASKA PACIFIC FISHERIES,
Appellee.

On Appeal from the United States District Court
of the Western District of Washington,
Northern Division.

APPELLEE'S PETITION FOR REHEARING

KERR & McCORD,
C. H. HANFORD,
Proctors for Petitioner.

Filed

LOWMAN & HANFORD CO., SEATTLE

SEP 22 1916

F. D. Monckton,
Clerk.

No. 2647

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY, a Corporation,
Claimant of the Steamship "Jeanie,"

Appellant,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Appellee.

APPELLEE'S PETITION FOR REHEARING

To the Judges of the United States Circuit Court
of Appeals for the Ninth Circuit:

The appellee herein respectfully asks for a rehearing of this cause for the purpose of obtaining more explicit directions with respect to costs on the appeal and interest which has accrued during the pendency of the case on the appeal.

COSTS ON THE APPEAL

The concluding paragraph of the opinion rendered by this Court reads as follows:

“The decree of the District Court will therefore be reversed, with directions to enter a decree in favor of appellee for \$11,146.26 and costs.”

This leaves the matter with respect to costs on the appeal undecided.

Every issue in the case was litigated in the Appellate Court, as on a trial, *de novo*, and the appellee is the prevailing party, except as to the *amount* of damages for delay. According to the actual effect of this Court's decision the decree appealed from should be modified and affirmed as modified. If in form reversed, nevertheless, Rule 31 reserves power in the Court to award costs on the appeal as the Court may by a special order direct.

The point on which this Court bases its decision reducing the damages was not considered by the Court below, and its attention was not directed thereto, and the assignments of error do not mention it.

In the opinion written by Judge Gilbert in the case of the “*Argo*,” 210 Fed. Rep. 872-875, this Court said:

“The decree will be modified by striking therefrom the allowance of interest from the

date of the injury to the date of the decree. In other respects it is affirmed. As the attention of the Court below was not directed to the error of allowing the interest, the appellee will be allowed his costs on the appeal."

The proctor who prosecuted the appeal in that case was not connected with the litigation until after Judge Howard, who rendered the decree appealed from, had ceased to be Judge of the District Court.

The appeal was sustained as to the principle contended for by the appellant and there was a substantial reduction of the amount awarded by the District Court to the appellee, nevertheless he was given costs on the appeal; in this case the main issue, as to liability for damages for delay, has been decided adversely to the appellant and it gains by the appeal only a reduction of the amount of damages less than ten per cent of the amount of the District Court's decree.

Observance of the rule of that case as an established rule of practice will discourage litigation in the Appellate Court involving only inadvertent errors which might be corrected without the expense and delay necessarily incidental to appeals.

We respectfully submit that the appellee herein, being the prevailing party on the trial *de novo*, is entitled to recover costs on the appeal as well as costs taxable in the District Court.

INTEREST ACCRUED DURING PENDENCY OF THE CASE ON APPEAL

The opinion filed herein sustains the appellee's claim for interest on the amount of cash outlay by appellee and the decree should carry interest on that sum from the date of payment thereof up to the time of entry of the final decree. But a new decree for only \$11,146.26 will not include the considerable sum accrued during the many months from the date of the decree appealed from to the date of the final decree to be entered pursuant to the mandate of this Court.

We respectfully submit that direction should be given to the District Court to render a decree in favor of appellee for an aggregate sum including \$4,283.06, plus interest on that sum at the rate of six per cent per annum from April 8th, 1913, plus \$6,285.00 and interest on the aggregate sum at the same rate from and after the date of the final decree and costs. Such a final decree we believe will accord with the intention of the Court manifest in the opinion filed.

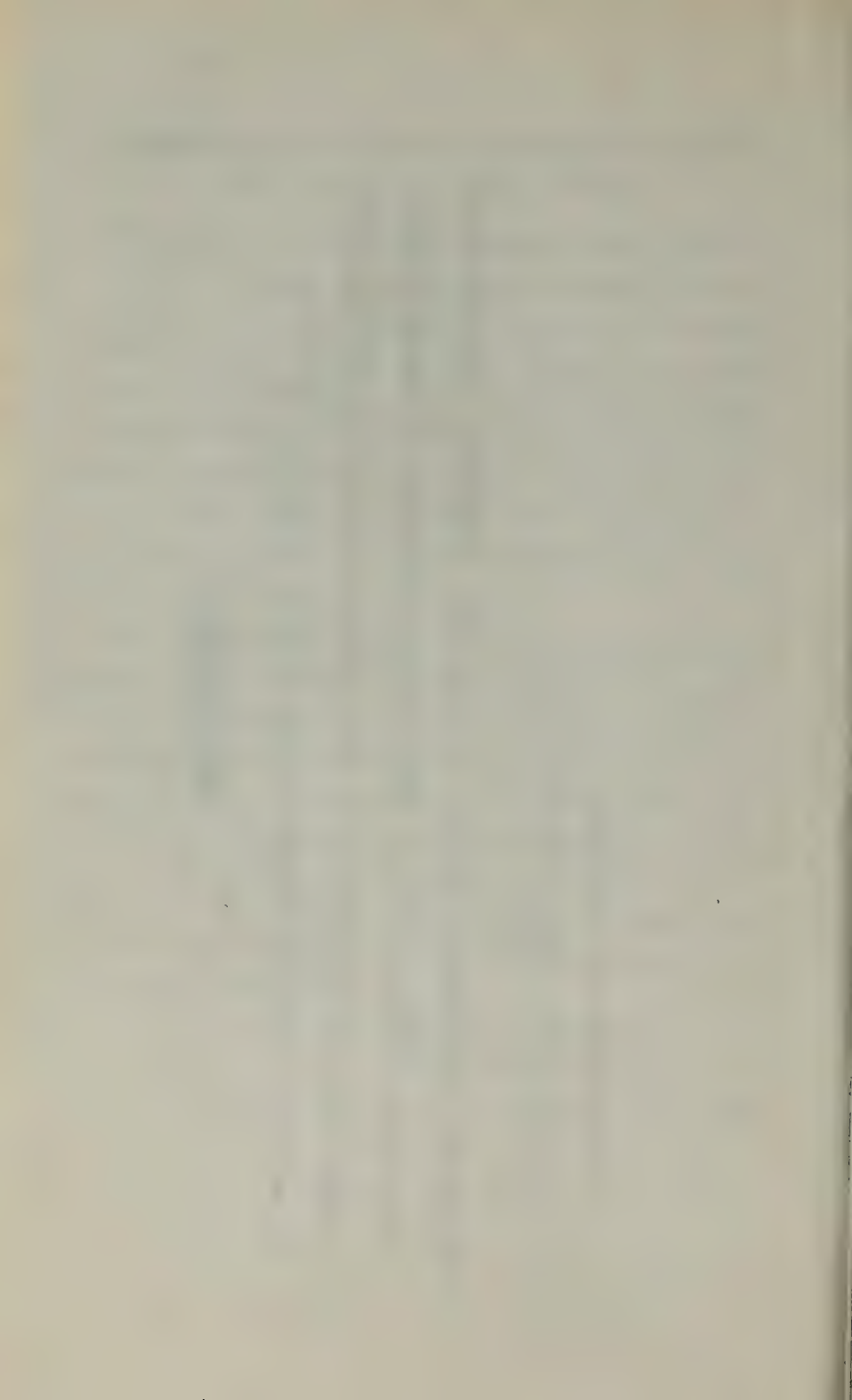
KERR & McCORD,
C. H. HANFORD,
Proctors for Appellee.

CERTIFICATE.

I, C. H. HANFORD, one of the proctors for the appellee in this cause, do hereby certify that I am counsel for the Petitioner named in this petition; that in my judgment said petition is well founded; and that it is not interposed for delay.

C. H. Hanford

Counsel for Petitioner.



No. 2647

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY, a
corporation,

Appellant,

vs.

ALASKA PACIFIC FISHERIES,
a corporation,

Appellee.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division

Appellant's Petition for Rehearing

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellant.

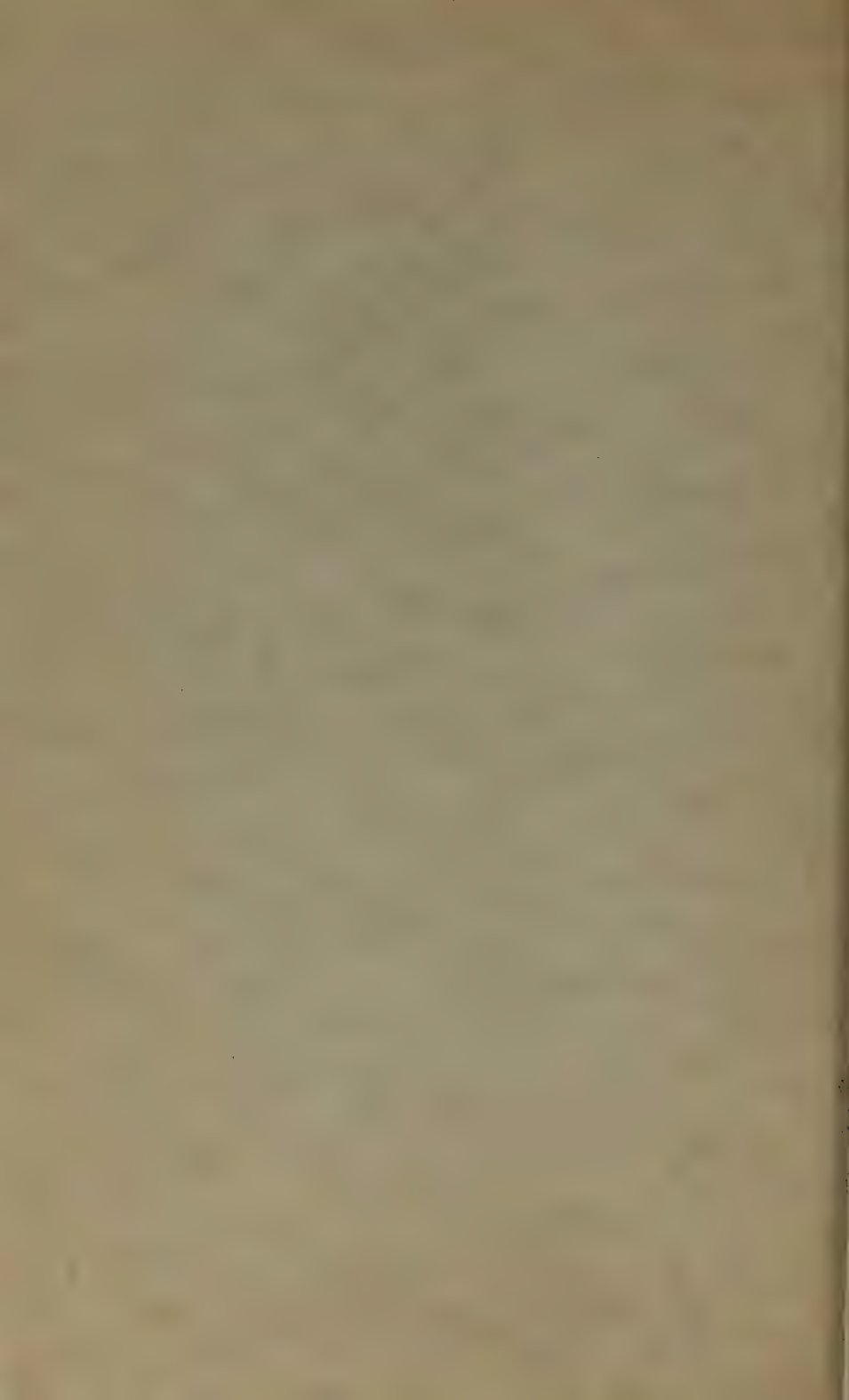
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W. H. BOGLE,
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LAWRENCE BOGLE,
Proctors for Appellant.

Seattle, Washington.

IN THE
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Appellant,

vs.

ALASKA PACIFIC FISHERIES,
a corporation,

Appellee.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division

Appellant's Petition for Rehearing

To the Honorable Judges of the United States Circuit Court of
Appeals for the Ninth Circuit:

The appellant herein respectfully petitions for
a rehearing of the above cause upon the question
of the allowance to appellee of \$6285.00, for the
loss in the market price of the salmon involved in
this suit, upon the grounds:

1. That the court, in its decision, apparently overlooked the undisputed evidence bearing on this question, and the authorities cited in our brief in support of our objection to such allowance, including a previous decision of this court.

2. That if such allowance is made under the undisputed testimony in this case, it would constitute such a departure from what has been generally recognized and judicially decided to be the measure of damages in such cases, as to make it just to appellant, as well as to carriers and the public generally, that the court state its reasons for making the allowance, in view of the testimony, as a guide in future similar cases.

ARGUMENT.

Appellant would not think of filing a petition for rehearing in this case, which was exhaustively argued in its brief and orally before the court, were it not for the fact that it is fully convinced that, through inadvertance, the court overlooked the importance, on principle, as well as to appellant, of the question of this allowance of damages for loss of market price, and, thereby, not only ordered an unjust allowance against appellant, but, if allowed to stand, its present decision would establish a precedent which would work great hardships upon

carriers, never intended by the court. We feel that it must be true the court overlooked the importance of this question, as well as the undisputed evidence thereon, and authorities cited, otherwise it would certainly have given some reason in its opinion for allowing appellee an item of over six thousand dollars as damages, in spite of the undisputed testimony of appellee's own witnesses that it had not sustained a dollar of such damage.

Practically the whole of the court's opinion is devoted to a discussion of the facts and law bearing upon appellant's liability in this case; but the court does not discuss either the evidence or law bearing upon the proper measure of damages to be applied to such liability. While appellant argued in its brief and orally, against any liability in this case, it did not consider nor argue that as the important question in the case, but most of its argument was directed against the amount of damages allowed by the lower court. This was principally because the question of liability rested largely upon disputed testimony; while, on the other hand the question as to liability for loss of market price rested, not merely upon a failure of proof by appellee, but upon the undisputed, affirmative testimony of appellee's own witnesses.

We accept the court's decision that appellant is liable in this suit "for the loss and damage to appellee's cargo" of salmon; we also accept the court's decision that appellant is liable, on account of such loss and damage to the cargo, for the sum of \$4,283.06, being the entire cost of reconditioning the portion of the cargo which was damaged; nor have we ever questioned the allowance of interest on so much of the cost of reconditioning the salmon as appellant might be held liable for, from the time of payment of such cost until the entry of judgment in the lower court; this interest amounting, under the court's decision to \$578.20. In other words, we now accept the court's decision finding appellant liable in the sum of \$4,861.26, with appellee's costs in the lower court taxed at the sum of \$204.90.

But we feel confident the court did not fully consider the further allowance of \$6,285.00 "for the loss in the market price of the salmon;" and that if it will give this question the consideration its importance deserves, not only from a monetary standpoint, but for the principle necessarily involved, it will be convinced that this amount, as well as the \$1,650.00 disallowed, should not be allowed appellee in this case under the undisputed

testimony, and the unanimous decisions of the courts, including this court.

Our argument in our brief on this question of loss of market price, commences on page 56 and extends to page 107, being the larger part of the argument in the brief. We there cited and quoted from a large number of authorities as follows:

“Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable.”

* * * * *

“Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages.”

Moore, Carriers, (2nd Ed.) pp. 623, 624.

“This universal and cardinal principle is, that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation, not to be compelled to pay more, except costs.

“This principle is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry out this principle; and when in any instance they do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable, or turned aside by an exception.”

Sutherland on Damages, Vol. 1, pp. 17-18.

“The elementary limitation of recovery to a just indemnity for actual injury, estimated upon the natural and proximate consequences of the injurious act, fixes a logical boundary of redress in the form of compensation, and furnishes a general test by which any particulars may be included or rejected. Recovery beyond nominal damages requires that actual injury be shown.”

Sutherland on Damages, Vol. 1, p. 127.

“Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages.”

Central Coal & Coke Co. vs. Hartman, 111 Fed. 96, at 98.

“A mining company, wrongfully enjoined from operating a mine, is not entitled to recover on the injunction bond profits lost, where it appears that, on account of other mines, operations were not suspended by the injunc-

tion, and that the particular mine would have been worked to an uncertain extent.”

U. S. Mining Co. vs. McCormick et al, 185 Fed. 748.

“The general rule is too well settled to require more than the merest reference to authority that only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable.”

Hollwig vs. Schaefer Brokerage Co., 197 Fed. 689, 701 (C. C. A. 6th Cir.).

“Where, in an action against a carrier for injuries to a steam shovel during transportation to the place where plaintiff intended to use the shovel in certain contract work, the only notice of special damages given to the carrier that would result from injury to the shovel beyond necessary repairs was from the delay which the carrier was notified would cause a loss of a contract penalty of \$50 a day, plaintiff not having suffered such penalty and the contract having been terminated for other reasons and the injuries to the shovel having been fully repaired, plaintiff was only entitled to recover nominal damages.”

Simons-Mayrant Co. vs. Atlantic Coast Line R. Co., 207 Fed. 387.

The case of *Magdeburg Gen. Ins. Co. vs. Paulson*, 29 Fed. 530, is especially in point on this question. There, a shipment of rice was damaged because of the unseaworthiness of the vessel. Libellant offered evidence to the effect that this damage

was about 34 per cent of the value of the rice. On the other hand, the ship showed that at very little expense the rice was reconditioned so that with the exception of a few bushels, it was in as good condition and sold for as much as though it had not been damaged. In that case, the Insurance Company had paid the owner the amount of his apparent loss and was subrogated to the rights of the owner, and sued for the amount it had paid, but the court refused to allow this claim, and allowed only the actual loss which resulted from the damage to the shipment.

“Compensation for the actual loss is the great desideratum in applying the measure of damage in each case to the particular facts therein developed, and no hidebound or technical rules should be allowed to thwart or obscure this purpose, when it can be avoided.”

Gulf etc. R. Co. vs. Godair, 22 S. W. (Tex. App.) 777.

The following authorities also state the same rule in clear terms:

“The result of this judgment is to award him his full contract price, allowing him the use of the outfit during the period it would have been gone and the saving of the incidental expenses. In other words, a greater margin or profit by the alleged breach of the contract than he could have made had it been performed. That a judgment of this kind cannot be sustained needs no citation of authorities.”

Kilpatrick vs. Inman, 105 Pac. (Colo.) 1080.

“The principle of justice, and, as I understand, of law, is, that the party injured is to be compensated, at least to the extent that redress is awarded judicially, for the actual loss sustained. The effort is to reach this measure as near as possible, and unless in cases fit for punitive damages, nothing more than this is to be given.”

Crater vs. Binninger, 33 N. J. L. 513.

“Since one who has been injured by the breach of a contract or the commission of a tort is entitled to a just and adequate compensation for such injury and no more, it follows that his recovery must be limited to a fair compensation and indemnity for his injury and loss. And so in no case should the injured party be placed in a better position than he would be in had the wrong not been done, or the contract not been broken.”

8 *R. C. L.* p. 434.

The foregoing rule is so fundamental, well established and just that appellee did not question its correctness; and this court recognizes the rule in its decision in this case, when it disallowed the item of \$1,650.00 because it is “of the opinion that a loss on this lot of salmon has not been proved.”

But it seems to us the allowance of the \$6,285.00 claimed by appellee as loss of market price on the balance of this shipment, other than the 5,500 cases sold and covered by the \$1,650.00 disallowed, is as little justified as the allowance of that item.

In our brief (pp. 56-60) we showed from the record in the case, that this claim for loss of market price was entirely an after-thought on the part of appellee, made for the first time *more than a year* after the goods arrived, and eleven months after the salmon was all reconditioned and sold and all its damages were known. We also showed that appellee had abandoned its claims for storage and insurance during the period of reconditioning, which were clearly as much recoverable as the loss of market price, because based on the same theory.

We then quoted every particle of testimony in the record bearing on this question of loss of market price, *all of which testimony was given by appellee's witnesses*. We quoted the testimony of Mr. Charles A. Burckhardt, President and Manager of appellee, testifying for appellee, in which the witness stated that he could not say whether or not appellee was "delayed in marketing this salmon by reason of it being overhauled;" but that Kelley-Clarke, appellee's brokers, would be able to give this information. (Brief, pp. 64, 67, Record pp. 178, 179, 188.)

This witness was later recalled by appellee, and was asked on cross-examination if appellee had "suffered any damage whatever by reason of the delay or the time consumed in reconditioning this

shipment; that you lost any market or that you lost any sale?" (R. p. 400.) An objection being made that this was not proper cross-examination, appellant called Mr. Burekhardt as its own witness, and he testified as follows:

His attention was called particularly to paragraph X of the amended libel, where it was alleged appellee had sustained this loss of \$7,935.00 by depreciation in market price, and asked if appellee had, in fact, sustained this loss or any part of it. (R. p. 401.) He dodged answering the question for sometime, but admitted that appellee was unable to dispose of this salmon during this reconditioning period; that it did not lose any sale of this salmon nor any opportunity to sell it during that time; that appellee would have had to hold the salmon, store and insure it during this period if it had not been damaged (R. pp. 401-403), and was finally asked this direct question: "*You did not actually suffer that loss, Mr. Burchhardt,*" and answered, "*As I stated before, I do not think we suffered any loss*" (R. p. 404.) He testified that he did not think appellee had sold any of the "Jeanie" salmon during this period, but admitted that if Mr. Small had so testified, it was probably true, as he would know. (R. p. 405.) He also admitted

that appellee had a large amount of the same brands of salmon in its warehouse at Seattle, unsold, and for which appellee had no sale, and he was asked this question:

“Q. We want to be perfectly fair here, Mr. Bureckhardt. Is it not a fact that in making up this computation that you have just taken the amount of salmon, and you figured up the market value of it, the day it arrived and you then figured up the market value the date when the reconditioning was entirely completed, and that you put that sum in irrespective of any sale or prospective sale?

A. Well, I would say that we did.

Q. (JUDGE HANFORD). Have you been advised by your counsel that that is the legal measure of the damages, and that you were entitled to recover that under the law?

A. Yes, sir.

Q. (MR. BOGLE). So that the question of sale or possible sale or purchase of this salmon did not enter into it at all?

A. No, sir.” (R. pp. 407-408.)

We also quoted the testimony of Mr. Small, Kelley-Clarke’s man who handled the sale of all this salmon for appellee, and testified for it in this case, in which he stated:

“Q. You had plenty of other salmon of the same grade?

A. Yes.

Q. Then, as a matter of fact, Mr. Small, did the Alaska Pacific Fisheries lose any market or lose any sale of salmon because of damage to the 'Jeanie' salmon?

A. I can't say that they did; no, sir." (R. pp. 304-305.)

He further testified that during this reconditioning period "we had a very ragged market and there were quite a good many goods."

"Q. That was because of the condition of the market?

A. Yes. The market conditions were very unhappy during the spring of 1913.

Q. That had nothing to do with the damage of the Jeanie—

A. (Interrupting). Not a particle; that had no bearing whatever.

Q. It had no bearing upon the sale of the pack of the Alaska Pacific Fisheries?

A. Not at all. The condition of the 'Jeanie' cargo, after it was properly overhauled, was in just as good condition as any salmon there was packed.

Q. I mean the fact that this salmon was damaged did not affect the sale of the pack by the Alaska Pacific Fisheries?

A. No, sir; not at all.

Q. And the delay in reconditioning the salmon did not affect the returns which they got from it?

A. Not at all." (R. pp. 307-308.)

It seemed to us this testimony, given by the President and General Manager of Appellee Company, and the salesman who had sole charge of all sales of this salmon, and knew all the facts about such sales, as Mr. Burekhardt testified, entirely and effectually disposed of this entire claim for loss of market price, under the rules of law above referred to.

If appellee did not "*lose any market or lose any sale of salmon because of damage to the 'Jeanie' salmon,*" "*and the delay in reconditioning the salmon did not affect the returns which they (appellee) got from it,*" and appellee "*did not actually suffer that loss,*" how could a judgment for damages for such loss, *or any part of it* be sustained, without shocking one's sense of justice, and violating the fundamental and universally established rule for the allowance of damages? And as the whole includes all the parts, this undisputed testimony from appellee's witnesses, that *no loss whatever* was sustained from loss of market or market price, seemed to us to make further argument on that question unnecessary.

It was not merely a failure of proof of damage, for which this court disallows the item of \$1,650.00, but it was affirmative proof, positive and undis-

puted, on appellee's part that it had *not sustained any damage whatever* on this account, either as to the 5,500 cases sold or the balance which it was unable to sell, *not because of its damaged condition, but because there was no purchaser for any part of it, and therefore no market for it.*

But we did not rest our argument on this question here. We considered this our strongest, in fact unanswerable and unanswered point on the appeal, because the law seems clear, and the facts so simple, undisputed and coming wholly from the other side. But we had been defeated in the lower court on this question, because, as we believe, the lower court did not carefully consider the question; its decision on this question being based on the theory that "The law presumes a loss equal to the depreciation in market value during the period of detention." (R. p. 492.)

While we felt there could be no award of damages based on a presumption alone, when the positive, undisputed testimony of appellee's witnesses was that such a presumption was untrue in fact, therefore leaving no room for the presumption; nevertheless, we felt that we should go further into the testimony, and show that the general statement of these witnesses, that there was no loss of market

or market price, was true as shown by the particular testimony given by appellee's witnesses on this question.

For this reason, we pointed out that appellee's testimony showed the sale and delivery of these 5,500 cases of Chums, before there was any drop in the so-called "market price" of this brand of salmon; therefore, there was no actual loss of market price on these cases; this substantiated, to the extent of these cases, the general statement of the witnesses that there was no loss of market price on any of the shipment.

Of the balance of the cargo, 14,373 cases were "Pinks," upon which no such loss was claimed. The total "Chums" in the shipment were 10,498 cases, of which 5,500 cases were sold without loss, leaving only 4,998 cases of "Chums," upon which any loss of market could be figured. The 10,498 cases of "Chums" in this cargo were composed of 3,511 cases of Trolling brand and 6,987 Spear brand, (Brief p. 92); the 5,500 cases sold were 4,000 Spear brand and 1,500 cases of Trolling brand, so that the 4,998 cases unsold consisted of 2,987 cases of Spear brand and 2,011 cases of Trolling brand.

We also showed that only 1,610 cases of these 4,998 cases were damaged at all; leaving 3,388 cases

wholly undamaged, that appellee had on hand at Seattle when this shipment arrived, 17,767 cases of this "Chum" brand, 5,298 cases being Trolling, 5,272 cases being Spear and 4,992 cases being Antler brand. Of this Antler brand, 3,000 cases were sold with the 5,500 cases Spear and Trolling in February.

We further showed that appellee *was unable to sell a single can* of this "Chum" salmon during any of the time from the arrival of this shipment January 8th until all reconditioning was completed on March 20th, other than these 8,500 cases sold in February. In other words, during this period, appellee *could not sell a can* of the 5,298 cases of Trolling, or the 5,272 cases of Spear or the 1,992 cases of Antler not sold, which appellee already had on hand. Nor during this period could appellee sell a can of the 3,388 cases of "Chums" of this shipment which were not damaged at all.

By the opinion filed in this case, the court allows the entire cost of reconditioning the 1,610 cases of "Chums" damaged, and in addition thereto allows a damage for loss of market of 30 cents per case on these 1,610 cases of "Chums," damaged and also 30 cents per case on the 3,388 cases wholly undamaged; when appellee could neither sell one of these 3,388 cases, nor one of the 14,767 cases of

other "Chums" on hand when this shipment arrived. The allowance is made for loss of market price, when appellee had no market for a can more than it actually sold, and is made in addition to the total cost of reconditioning the few cases damaged. It is also made without any testimony showing when all damage to this "Chum" salmon was repaired, so as to make it all available for sale, after which time certainly, appellant could not be held liable, in any event, for any drop in the market.

Turning to the "Medium Reds," we showed that of 4,786 cases of this salmon in the shipment, *only 498 cases were damaged at all*, leaving 4,288 cases wholly undamaged and available for sale at all times. We also showed that appellee had on hand unsold when this shipment arrived, 4,014 cases of this grade, making a total of 8,302 cases of this grade always available for sale, and yet appellee was able to sell of this grade during this period *only 708 cases in all*. (Brief p. 91.)

In spite of this uncontradicted testimony given by appellee's witnesses, and in the absence of any showing when the 498 damaged cases of "Medium Reds" were reconditioned, so that it was all available for sale, when appellant's liability for loss of market would certainly cease, the decision of the

court allows a damage of \$4,786 for loss of market price of the "Medium Red" salmon, in addition to the entire cost of reconditioning the 498 damaged cases.

Almost half the damage to this shipment was to the "Pinks," which did not drop in price (1,980 cases out of 4,088 damaged). (Brief p. 93.) Under the rule that a shipper is bound to lessen his damage as much as possible, appellee was bound to first recondition the few damaged cases of "Chums" and "Medium Reds," the asking prices of which were dropping, leaving the "Pinks" until the last, because their asking price remained the same. Nor could it charge appellant with loss of market price of "Chums" and "Medium Reds," especially on nearly 7,600 cases of those grades, wholly undamaged, while it was reconditioning the 1,980 cases of "Pinks" for which it had no sale, and the asking price of which did not drop at all.

The foregoing statements of fact were all set forth in our brief, with references to the record to sustain every item, and no question has ever been raised about the correctness of these statements. The statements are based entirely upon the testimony of appellee's witnesses, and are uncontradicted. These figures certainly show in detail

and conclusively the truth of the testimony of Mr. Burekhardt and Mr. Small that appellee did not sustain a dollar of damage on account of loss of market or market price of the salmon in this shipment; and we cannot believe this court, after fully considering these facts, would award appellee \$6,285.00 as damage for loss of market price, in addition to the entire cost of reconditioning the damaged cases, thereby placing appellee in a better position by 30 cents per case for the "Chums" and \$1.00 per case for the "Medium Reds" in the shipment, than if there had been no damage at all; also giving appellee 30 cents per case more for the "Chums," and \$1.00 per case more for the "Medium Reds," in this shipment than it received or could obtain for the same grades it already had on hand unsold at Seattle, when this shipment arrived.

In our brief, we urged other reasons why this allowance could not be made, none of which reasons are mentioned by the court in its decision, but which, we believe were overlooked by the court.

We pointed out that the evidence wholly failed to show any "market price" for this salmon, within the legal meaning of that term. We referred to the testimony of Mr. Small, appellee's witness, showing that the so-called "market price" for salmon was

merely the *asking price*, fixed by the sole owners of canned salmon, not the price at which the salmon, even in small quantities could be sold. (Brief pp. 73-75.) He stated that the Alaska Packers' Association of San Francisco, the largest packer of salmon on this coast, after considering the probable extent of the season's pack, and the demand therefor and general business conditions, sent out a circular fixing the price at which it would sell its salmon of various brands and grades, and that the little dealers, which included those represented by Kelley-Clarke, who handled all of appellee's pack, were forced to sell their salmon at this price. Whether or not there was an express agreement between all of these dealers in fixing this price, at least there was such a common understanding among them as to amount to an agreement to arbitrarily fix the price at which they would sell the only available canned salmon in these markets. They maintained this price and compelled persons desiring to purchase salmon on this coast to pay the same or go without, until about the middle of February, 1913, when the owners of salmon, being unable to dispose of their pack at these prices, and in order to induce purchasers to take it off their hands before the next season's pack came in, commenced to reduce their

price; but even then they were unable to dispose of the pack until they had put their price down to such a figure as purchasers were willing to pay.

At the time of the arrival of this salmon and during the entire period it was being reconditioned, there were no purchasers who were willing to pay the prices asked for these grades of salmon, except for small quantities thereof. It was absolutely impossible for appellee to have sold this entire cargo, or any considerable portion of it, at any of the prices named by Mr. Small, as the market price during the period of reconditioning.

It would not seem to be necessary to cite authority that there can be no market for an article of commerce, nor a "market price" therefor, unless there are persons willing to purchase the article at the price the owner is willing to sell for. A market cannot be made by either seller or purchaser alone, nor can the market price of an article be determined alone by what the owner is willing to take or a buyer is willing to give.

"In order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor, and an ability from such demand to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a

thing, and no ability to sell the same, then it cannot be said to have a market value."

8 Ruling Case Law, 487-488.

The definition of the term "market value" is well stated as follows:

"The 'market value' of a commodity, in its last analysis, means the price which it will bring in cash from a buyer who is willing to pay its value."

Parish & Co. vs. Yazoo R. Co. 60 So. 322.

In the case of *Kountz vs. Kirkpatrick*, 72 Pa. St., 376, the court discussed the testimony as to the market value of oil. It appeared in that case that dealers in oil had bought up large stocks of available oil for the purpose of holding up the price, and fixed an arbitrary price at which they were willing to sell. The court quoted the following definition of "market price:"

"To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but

according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance.”

The court then discussed the evidence in that case of the fixing of the price at which holders of oil were willing to sell, and held that this evidence did not show a market price.

In the case of *Lovejoy vs. Michels*, 40 N. W. (Mich.) 901, recovery of the reasonable value of goods was sought; the evidence of value was the price fixed by a combination of dealers to fix prices of these goods. The court said:

“The trial judge heard and submitted the case upon the theory that a combination to fix prices was not unlawful if the purpose was to fix reasonable prices, and when defendant sought to show that the prices fixed were not fair market prices, and were above the market value, the court refused to permit him, and restricted him to the market price, when, as a matter of fact, the association embraced all the manufacturers, and the only ‘market price’ was

that fixed by the association. In *Richardson vs. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102, this court held that any combination to control prices was unlawful, as against public policy. In the present case, as in that, it was claimed that the combination had in fact reduced prices, and upon that point the court say: 'It is no answer to say that this monopoly has in fact reduced prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an exorbitant degree.' In the present case no price was agreed upon at the time the order was given, and there was no evidence tending to show that defendant had any knowledge of the price fixed by the association. An attempt is made to fasten a price fixed by a combination upon such a purchaser. It is sufficient to know that the price sought to be imposed is that fixed by the combination. If so, it was unlawfully fixed, and has no force as a market price, for that reason. It is the combination for the purpose of controlling prices that is unlawful, and the fact that they, the manufacturers, deemed the prices fixed to be reasonable, does not purge it of its unlawful character. Independently of the unlawful character of the combination fixing it, a price so fixed cannot be regarded as any better evidence of value than that fixed by any vendor upon his own wares. A price so fixed is not to be entitled to rank as the market price. It is not a market price, within the contemplation of the law. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition. It cannot be divested of these incidents, and retain its char-

acter. Associations of this character give the buyer no voice, and close the market against competition."

In the case of *C. R. I. & P. Co. vs. Broe*, 86 Pac. (Okl.) 441, the court discussed the term "market value" as used in a statute fixing the measure of damages for delay in shipments of merchandise. The shipments under consideration there were large quantities of nails and wire, but the only evidence of market value was what the nails and wire would sell for per pound. The court said:

"The evidence on this point did not conform to the rule for determining such value. The market value, as applied to the case at bar, in contemplation of law, would have been what the different articles of merchandise would have sold for in bulk in the open market at Lawton on the different dates. The law does not contemplate that the carrier shall be liable for the value of merchandise if sold at retail. Such a rule would make the carrier liable, not for the market value of goods as sold in car load lots or in quantities as carried by it, but would also add to and include the profits of the sales at retail, without taking into consideration the costs incident to such sales. There was no evidence before the jury by which it could determine the difference in the value of the articles in question when sold in bulk and when at retail. The case was tried upon the theory that the retail market should control. The court gave the jury no instructions as to this matter, and in the light of the entire record we must conclude that the jury understood that by 'mar-

ket value' was meant the value which such articles sold for in the retail trade. The damages were estimated by an improper standard."

"No element of loss can be considered in the computation of damages, that is not clearly and unqualifiedly proved. * * * So, where there is no market price for an article, damages cannot be computed upon the belief of plaintiff, or other witnesses, more or less probable, that the commodity contracted for, and not delivered, could have been sold for a certain price."

Iron City Tool Works vs. Welisch, 128 Fed. 693 (C. C. A. 3rd.)

"If the goods have no market value, the measure of damages (for injury to goods) is usually the cost of reproducing and replacing the articles, if this can be done;"

Elliott on Rys., Sec. 1734 (2nd Ed.).

The rule laid down in these authorities has not been questioned, and we cannot believe the court fully considered the same or the evidence, when it stated that the "market value" of this salmon was \$85,630 when the shipment arrived, and fell to \$77,695 when it was all reconditioned.

We also argued in our brief that the rule or difference in "market value" between the time of arrival and time the damage is repaired has no application to a case of damage to a shipment, but only where there has been a *delay* in arrival. In support of this contention we cited a number of

authorities. (Brief pp. 94-95.) Among other cases we cited the case of *The Berengere*, 155 Fed. 439, in which Judge Wolverton expressly stated:

“The rule, however, is otherwise where there has been no delay, and the cargo is damaged through fault of the carrier. In such case the measure of damages is the difference between the value of the goods in their damaged state and their value at the port of destination, had they been delivered in good order.”

He quoted from the case of *The Compta*, 6 Fed Cas. p. 233, No. 3070, as follows:

“The shipowner by the bill of lading does not enter into any agreement with the owner of goods that may be damaged to go into a joint speculative operation founded upon the anticipated state of the market at some indefinite future time, to be judged of by the shipper, who retains in his own hands the whole conduct of the adventure. Such a rule would impose on the shipowner obligations and liabilities little suspected by persons engaged in that business, and of which his contract by bill of lading contains no hint. The only safe, rational, and equal rule is to hold, as before stated, the vessel liable for the difference between market value of the goods, if sound, and their value in their damaged condition at the time and place of delivery.”

Both of these cases are cited and approved by this court in the case of *United S. S. Co. vs. Haskins*, 181 Fed. 962, 965, and we do not believe the court considered these cases or intended to

overrule its former decision, or hold contrary to the authorities there cited and approved, although that would clearly be the effect of its decision heretofore rendered herein.

In this case, as there was no market for this cargo of salmon, that is, no one who would buy it at the prices appellee asked, and it was shipped only to be held until it would be sold, and, therefore, there was no "market value" within the rule of all the decisions, appellee first made its claim under the proper rule applying in such case, to-wit: the cost of repairing the damage, which the court has allowed. But long after this claim was made, and this suit commenced, as an afterthought, it claimed additional damages under the rule applying only where there has been a delay in the transportation.

We also argued that there was no competent evidence of "market price," for the reason, besides those already referred to, that the testimony was as to the price at retail per case, which could not be applied to a shipment of nearly 30,000 cases.

C. R. I. & P. R. Co. vs. Broc, supra.

All of these points were raised and argued at length in our brief, and to some extent on the

oral argument. Appellee has never questioned our statement of the facts and record, nor cited any authorities holding contrary to those cited by us; nor did it cite any authority to sustain its contention that the measure of damages in such a case as this, is the cost of repairing the damage *plus* the loss of market price; nor to show that there was any loss of market price in fact, nor to sustain its contention that it could recover damages it expressly admitted it did not sustain.

It has seemed to us the proper view to take of this question, under the settled law, as we understand it, is this: Assume appellant liable for all actual loss appellee suffered by reason of the damage to this salmon, what would place appellee in the same position as though there had been no damage? Clearly, under the evidence, if the shipment had been delivered in perfect condition, appellee would not have sold a case more than it did in fact sell, either of the "Jeanie" salmon or what it already had on hand; nor would it have received a dollar more for any of its salmon than it did in fact receive. Clearly, therefore, its *sole and entire loss* by reason of the damage to this shipment was the cost of repairing the damage, \$4,283.06, with interest thereon from date of pay-

ment to the time a correct judgment therefor in the lower court should have been entered, to-wit, from April 8, 1913, to July 12, 1915, and costs in the lower court. To allow anything more than this, would be to place appellee in a *better position* than if the shipment had not been damaged at all; give it a better price than it would otherwise have received for this salmon, and better than it could or did receive for other similar salmon already on hand, available for sale, but which could not be sold. Of course, the fact that appellee had this other salmon already on hand available for sale, but which it could not sell, is material under the evidence in the case, only as it shows there was no market for the "Jeanie" salmon, even if undamaged, and therefore there was no loss of market price, for which appellee should be compensated.

After reading the court's opinion in this case, we are firmly convinced the court overlooked the facts and rules here referred to. We cannot believe that it would disallow an item of damage because appellee had failed to prove it sustained such a loss; and intentionally allow the same kind of damage on other cases of this shipment, when appellant's proof, not only failed to prove such damage, but expressly, both in terms and in detail,

showed affirmatively that it *had not* sustained a dollar of such damage. The court certainly would not render such a decision without even a mention of the rules of law referred to, or the undisputed facts, if it had understood the facts and the importance of its decision on this point, not only to appellant, but to carriers and the public generally.

For these reasons, believing as we do that the court has unintentionally overlooked the most important point in the case, and rendered a decision on this question, which would not only work a great injustice to appellant, but constitute a precedent for most unjust claims against carriers, we respectfully ask the court to grant a rehearing of the case on this question of the allowance of any damage for loss of market price.

Dated Seattle, Washington, September 27, 1916.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Petitioner.

APPELLANT'S ANSWER TO PETITION OF APPELLEE FOR REHEARING.

Appellee has served us with a petition for rehearing on the question of costs on appeal and interest pending appeal. If appellant's foregoing petition should be allowed, and the court's decision modified as requested by appellant, that, of course, would dispose of appellee's petition. If, however, appellant's petition is denied, and the court considers appellee's petition, we respectfully submit the same should be denied.

COSTS ON THE APPEAL.

The decision of the court awarding costs to appellee, clearly refers to its costs in the lower court. The judgment of the lower court was for a total sum "and costs;" the decision of this court cut this total sum down \$1,650.00, and ordered a new judgment for the balance, and appellee being entitled to its costs below, the court necessarily so provided.

Under the rules and practice of this court, the costs on appeal follow the reversal of the judgment of the lower court.

Benedict, Adm. (4th Ed.), Sec. 587.

“The appellant was put to the necessity of an appeal to secure a proper modification of the decree. * * * There is no good reason why the appellant shall be required to bear the costs of a necessary appeal.”

The Umbria, 59 Fed. 475.

“Where the decree in the lower court is in favor of the appellee, and appellant secures a modification of the decree of the lower court, appellant is entitled to recover its costs in the appellate court against the appellee.”

The Strathleven, 213 Fed. (C. C. A.) 979.

The Horace B. Parker, 76 Fed. (C. C. A.) 238.

In this case appellant was compelled to incur the expense of an appeal in order to avoid paying the \$1,650.00 improperly allowed by the lower court. It should not be penalized by paying the costs of the appeal, when compelled to appeal and doing so successfully.

It is stated in appellee's petition for rehearing that the attention of the lower court was not directed to the point upon which this court reversed the judgment of the lower court.

The same statement was made in appellee's brief on this appeal, and orally before the court during the argument. At that time we disputed the statement, and read to this court an excerpt from

our office copy of our typewritten brief served and filed in court below, which expressly referred to this point, and the pages of the testimony bearing thereon; thereby showing that the point was expressly raised below in the brief, aside from our claim that it was also raised on the oral argument below.

Appellee has not disputed our statement as to the excerpt so read, which could be done if we were incorrect in this statement, either by sending up for inspection our original brief below, which is on file there, or producing the copy served on proctors for appellee. Not having done either, we believe our statement on this question should be considered correct.

Appellant assigned error on the allowance of *any part* of the \$7,935.00 for loss of market price, because not warranted by the evidence and the law applicable thereto. It was not obliged to pick out each particular item of such allowance and assign error separately as to each item. Such a practice has been condemned. Its assignment challenged each part of this item, and covered the argument following against each part thereof.

This case is not like the case of the "*Argo*," 210 Fed. 872, in which the lower court was sustained, except in the allowance of interest on an

award of damages for a tort. In this case the court erred in allowing a large sum as damages; appellant was compelled to appeal, to avoid paying this amount, and the question involved the consideration of questions of fact and law. Being successful, under the authorities, it is entitled to recover costs on appeal.

INTEREST PENDING APPEAL.

No reason can be given for compelling appellant to pay interest pending the appeal, on the amount this court finds appellant should pay. Interest is a ²penalty for non-payment of what is justly due, *after that amount is determined*. The amount found by the lower court was not justly due; and appellant could not pay the judgment and avoid the penalty of interest, without paying a large amount this court finds it should not pay. To compel it to pay interest pending the appeal, would be to penalize it for refusing to pay what it did not justly owe. Appellee unjustly claimed a large amount, which it compelled appellant to pay or come to this court for relief. The decision of this court is a final determination of the amount due from appellant, and interest should run on that amount only from the date of the entry of judgment there-

for, when for the first time appellant can pay and avoid interest.

Johnston vs. Gerry, 34 Wash. 525, 76 Pac. 258,
77 Pac. 503.

The Grapeshot, 10 Fed. Cas. No. 5,703.


We respectfully submit that appellee's petition for rehearing should be denied.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellant.

*United States of America, Western District of
Washington, County of King—ss.*

I, F. T. MERRITT, one of the proctors for the appellant in this cause, do hereby certify that I am counsel for the Petitioner named in the foregoing petition for rehearing in said cause; that in my judgment the said petition is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated Seattle, Washington, September 27, 1916.



Of Counsel for Petitioner.

